In the Supreme Court

OF THE UNITED STATES.

NO. 213.

WILLIAM G. WINSLOW, ET AL.,

VS.

BLISS O. WILCOX, OWNER, &C.

Appeal in Admiralty.

BRIEF FOR APPELLANTS.

H. L. TERRELL,

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In the Supreme Court

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NO. 243.

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VS.
BLISS O. WILCOX, OWNER, &C.
} APPEAL IN ADMIRALTY.

BRIEF FOR APPELLANTS.

The merits of cases in Admiralty being no longer the subject of consideration by this Court, the only question of error for determination is that raised by the Bill of Exceptions herein.

The facts upon which the question arises are confined to narrow limits, and may be briefly stated.

STATEMENT OF FACTS.

(1.) The final decree in this cause in the *District Court* was rendered on the *26th day of December*, 1877.

(2.) The 23d Rule in Admiralty of the District Court relating to appeals in Admiralty in force at that time provided as follows: (See Exhibit "A" to Bill of Exceptions, Rec. pp. 213-214.)

"Appeals in Admiralty to the Circuit Court *shall be* " *taken within ten days from the date of the decrees unless* " *further time be given by special order of the judge. The* " *appeal shall be in writing, and shall specify particu-* " *larly from what part of the decree, if less than the whole,* " *the appeal is taken; also whether it is intended to make* " *new allegations or proofs, and, if so, what; and whether* " *it is intended to pray for any other relief, and, if so,* " *what; and on the trial above the appellant shall be* " *strictly confined to the specifications in his appeal.* * *

" *The appeal shall be filed with the Clerk of the Dis-* " *trict Court, and from that time, security having been* " *given, it shall be considered as perfected.*" * * * *

(3.) By special order of the Court the time for taking an appeal from the final decree of the District Court was extended to include twenty days from the date of said decree, and expired on the 15th day of January, 1878. (See decree of District Court, Rec. p. 180.)

(4.) No "appeal in writing" was filed in the District Court on or before January 15th, 1878, as required by the Rule of Court, nor was any such appeal ever filed in said District Court, nor any attempt made in that direction. On February 27th, 1878, such a writing was filed in the Circuit Court. This was forty-two days after the expiration of the time for perfecting the appeal in the District Court. (See Bill of Exceptions, Rec. p. 213.)

Upon this state of facts it is believed that the Circuit Court never obtained jurisdiction of the case, and that its decree is *coram non*.

It is submitted

1st. That in respect to appeals in Admiralty from the District to the Circuit Courts of the United States, the Acts of Congress make no provision as to the time in which such appeals are to be taken, or as to the mode in which they are to be perfected.

Section 631 of the Revised Statutes has re-enacted, in substance, the provisions of the original statutes on the subject of appeals from the District Court, and provides simply that they shall be taken to the next term of the Circuit Court.

2d. That Congress having made no provision as to the time or mode of appeal from the District to the Circuit Court, the District Court, under express authority conferred by the Practice Acts of 1789, 1792, 1793 and 1842, has full power and authority, by general rule, or by special order in the particular case, to prescribe the time and mode for perfecting appeals from the District to the Circuit Court in Admiralty, and such rule or order is as binding as a statute.

Rule 45 of the Supreme Court of the United States in Admiralty expressly recognizes this doctrine and gives its authority to its enforcement.

The following authorities are decisive upon this question:

3 Mason, 443; 3 Sumner, 495; 1 Black, 522; 1 Abbot's Admiralty, 422; 8 Peters, 262; 12 Peters, 472; 9 Peters, 329; 14 Peters 448.

The above adjudications as to the effect of rules of court were made before the re-enactment of the statutes contained in the Revised Statutes of the United States; and upon familiar principles, in re-enacting in the Revised Statutes, the provisions of the law in respect to appeals as they stood in the original statutes, the construction given those statutes by such adjudications was thereby adopted.

3d. The rule of the District Court having the force of a statute, its requirements as to the time and mode in which an appeal from its decree in Admiralty must be taken and perfected, are jurisdictional and imperative. Upon this subject a liberal quotation from two authorities will illustrate the state of the law as we understand it:

Norton vs. Rich, 3 Mason 443:

"The judiciary act of 1789, ch. 20, has expressly prescribed a period of five years, within which appeals may be made from the decrees of the Circuit Court to the Supreme Court, and the mode in which it is to be done, by a citation to the adverse party, &c., &c. But it has provided no mode as to appeals from the decrees of the District Courts to the Circuit Courts, confining the appeal only to the *next* Circuit Court. This omission seems to indicate a difference of intention in Congress as to appeals

from the Circuit and District Courts, leaving appeals from the latter to be regulated by the discretion of the Court, or to be made only at the time of the decree. The case, therefore, being untouched by statute, must be decided upon general principles. The acts of 1792, ch. 36, and 1793, ch. 22, have given to all the courts of the United States authority to make such regulations for their practice and business, as they may deem expedient; and doubtless under these acts, as appeals from the District Courts are unprovided for by statute, these courts may by rule prescribe the times and modes of making them. They may require appeals to be made in open court before an adjournment *sine die*, or afterwards, within a fixed time, in the clerk's office. It would be unreasonable to suspend the execution of a decree during a whole vacation; and after execution once authorized and carried into effect, it would be inconvenient to allow appeals to the Circuit Court.

"In this district no regulations as to appeals have ever been made by the District Court. The uniform course, from the earliest period, has been to make the appeal in open court, *apud acta*, before the adjournment of the court. This course of practice is equivolent to a rule of the court; and must be considered as directory to all parties. Wherever a desire for further time to consider of an appeal has been asked for, it has been rapidly acceded to by an adjournment of the Court for this purpose.

"If I were to grant the petition in this case, it would be assuming the right to regulate the proceedings of the District Court in a matter plainly within its general jurisdic-

tion and authority. The decision of the District Judge is in conformity to the general practice. No evil has hitherto grown out of it; and I do not feel myself at liberty to disturb it. If any inconvenience should arise, it can easily be obviated by a special application to, or a general rule of, the District Court."

Steamboat New England, 3 Sumner, 495:

"By the act of 1789, ch. 20, sec. 21, an appeal is allowed from final decrees of the District Court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars (since that time altered to fifty dollars), exclusive of costs; but the appeal is allowed only to the next Circuit Court to be held in the district. In what mode and at what time the appeal is to be made, is not pointed out by the statute. By the civil law, and also by the general practice of the Admiralty Courts of England, the appeal may be made *viva voce* in open Court, or in writing *apud acta* at the time of the pronouncing the decree, or within ten days afterwards in writing before a notary, who authenticates the instrument of appeal. In America, this practice has not to my knowledge ever been adopted. The uniform course, as far as I know, has been to interpose the appeal during the term or sitting of the District Court, at which the decree passed, and before its final adjournment, or to interpose it within some stipulated period after the term or sitting, fixed by the general rules of the Court, or specially prescribed and allowed by the Court in the particular case, upon the motion of the party aggrieved. And in each of these cases, if the appeal is taken within the

prescribed period, it is entered upon the record of the proceedings, *apud acta*, by the clerk of the Court; and when entered, it takes effect in the same manner by relation back, as if entered in open Court upon the record, when the sentence was pronounced. If no appeal is taken in either of these ways within the proper period, and the District Court is adjourned without day, then it is understood, that the party waives any appeal, and the Court proceeds to execute its decree; and no appeal subsequently taken by the party, even if offered or entered before the next term of the Circuit Court, is understood to possess any validity; but it is treated as a mere nullity. Such, at least, has been the invariable practice in this circuit; and it was fully recognized and enforced in the case of *Norton* v. *Rich* (3 Mason R. 443). And it appears to me, that the practice is settled upon true principles; for, otherwise, the execution of the decree of the District Court would be suspended until after the next Circuit Court, or the objects of the appeal might be in a great measure defeated by the total or partial execution of it. Be this as it may, I have no doubt whatsoever of the authority of the District Court to prescribe by its rules the term wherein appeals shall be entered, and that the parties would be bound by the limitation prescribed by those rules."

It is worthy of remark that these two decisions were made by Judge Story, who is accredited with the authorship of the rules of the Supreme Court in Admiralty substantially as they now stand, and whose opinions upon such questions have always been regarded as authoritative.

That regulations of statute, or of rules which have the force of statute, prescribing the time and mode in which appeals may be taken are jurisdictional, we regard as so well settled as not to need extended argument or the citation of numerous authorities. Under no system of procedure that we have any knowledge of, have such regulations ever been held to be anything else than jurisdictional; and that a decree of a court of competent jurisdiction can be disturbed or reversed in any other mode or way than that pointed out by statute, or a rule having the force of statute, seems to be too absurd a proposition for discussion.

Now, it is conceded that the plain and imperative requirements of the rule of the District Court in respect to appeals, and upon the fulfillment of which alone its decrees are permitted to be disturbed, have in this case not been complied with. The rule referred to requires two things to be done in order to perfect an appeal: First, the filing with the Clerk of the District Court of an appeal in writing therein particularly described, and, second, the giving of security, and it provides as to the time when the appeal shall be considered as perfected the following plain and explicit statement: The appeal shall be filed with the Clerk of the District Court and from that time, security having been given, it shall be considered as perfected."

By this clause the filing of the required appeal in writing is made the main, substantive and important jurisdictional act in the perfection of an appeal, and the rule in a former clause sets forth the time in which it must be done.

To hold that an appeal can be perfected without the filing of such appeal in writing is to hold that the rule has no force or effect; because the rule gives emphasis to the fact that it is only from the time of the filing of such an appeal in writing that the appeal can be considered as perfected.

Anticipating now the points made by opposing counsel in the argument upon this question in the court below we have the following suggestions to make in respect to their claims and the authorities upon which they rely.

I. Their first proposition was as follows: That they have the whole of the next term of the Circuit Court in which to perfect their appeal.

The two authorities referred to by them in support of this proposition, viz.: 3 Peters, 68; 2 Black, 721-2, have no possible application to the case at bar.

3 Peters, 68, holds that where the Supreme Court rules provide that parties litigant in that court shall file a transcript of proceedings therein within a certain time, and where also the established practice of the Supreme Court under such rule is to allow appellants to lodge a transcript of the record at any time during the term with a motion to re-instate, the court would not allow the clerk to issue an official certificate of dismissal before the close of the term, because that would be to prejudge the motion to re-instate.

It will be seen, therefore, 1st: That the court does not intimate an opinion as to whether failure to file transcript

within the rule is fatal, and 2d, that the court merely holds that in advance of the hearing of the motion to reinstate filed under and authorized by the established practice of the court in such cases the court will not prejudge such motion by ordering the clerk to issue a certificate of dismissal.

In addition it is perfectly apparent, of course, that the appeal having been perfected to that term of the court, the rule of the Supreme Court prescribing within what days of the term the transcript shall be filed for its convenience is not *jurisdictional*, whereas provisions for filing and perfecting appeals are always jurisdictional, since the vested rights accruing under judgment of the lower court can only be interfered with in the manner prescribed.

The case in 2 Black, 721-2, holds that where the Act of Congress provides that in addition to perfecting the appeal the transcript itself must be filed at the next term of the court, the omission to file the transcript at such term is fatal.

II. It was said by opposing counsel that a rule of court may be waived or controlled by the court.

In its broadest sense this is not true; stated as follows, it is true, viz.: A rule of court *not jurisdictional* may be waived or controlled by the court.

The courts of the United States being courts of limited jurisdiction, neither the court nor the parties can waive a jurisdictional matter.

That consent of parties will not waive jurisdictional fact—see:

19 How., 393.
4 McLean, 1.
12 Peters, 657.
4 Wash. C. C., 482.
2 Cranch, 126.
19 How., 271.

That the court itself cannot waive a jurisdictional fact—see:

21 How., 85.
" " 386.
" " 389.

That it is never too late to raise the question of jurisdiction, see:

6 Call, 245.

Now as to the authorities cited by the counsel for the claimant we submit as follows:

The case in 3 Woodbury & Minot, 359, holds that a rule of the court as to the time within which a plea shall be filed is within the control of the court.

This of course is readily admitted, since it is a rule of convenience merely and is in nowise jurisdictional. The court having acquired jurisdiction of the case it is folly, of course, to liken a rule in respect to the filing of pleadings therein, which has no earthly relation to jurisdiction, to a rule fixing the time and mode of appeal as authorized by Act of Congress which is purely jnrisdictional.

The case in 5 Wall., 822, at first glance is more serious; however, its antagonism to the grounds we maintain in the case at bar is rather apparent than real.

1. The case in 5 Wall., 822, is an *equity* case, and is an appeal from the Circuit to the Supreme Court.

2. The Acts of Congress in respect to appeals in equity are essentially different in their requirements from the acts in respect to appeals *in admiralty* from the District to the Circuit Courts.

The Act of Congress in force at the time of the appeal of the case in 5 Wall., in respect to appeals in equity from the Circuit to the Supreme Court, provided as follows:

"And such appeals shall be subject to the same rules, "regulations and restrictions as are prescribed in law in "case of writs of error."

Referring now to the Acts of Congress then in force in respect to the regulation in relation to writs of error in cases at law, we find the provision to have been as follows:

"Final decrees and judgments in civil actions in a Dis- "trict Court, where the matter in dispute exceeds the sum "of fifty dollars, exclusive of costs, may be re-examined "and reversed or affirmed in a Circuit Court, holden in the "same district, upon a writ of error; *whereto shall be an-* "*nexed and returned therewith at the day and place there-* "*in mentioned, an authenticated transcript of the record,* "*an assignment of errors and prayer for reversal, with a* "*citation to the adverse party, signed by the judge of such* "*District Court, or a Justice of the Supreme Court,* "*the adverse party having at least twenty days no-* "*tice. And upon a like process, may final judgments* "*and decrees in civil actions, and suits in equity, in*

*"a Circuit Court, * * * * where the matter in dis-*
"pute exceeds the sum of two thousand dollars, exclusive of
"costs, be re-examined, reversed or affirmed in the Supreme
"Court, the citation in such case being signed by a judge
"of such Circuit Court, or a justice of the Supreme
"Court, and the adverse party having at least thirty days
*"notice, * * * * and every justice or judge signing*
"any citation on any writ of error as aforesaid: shall
"take good and sufficient security that the plaintiff in error
"shall prosecute his writ to effect, and answer all dam-
"ages and costs if he fail to make his plea good."

It is evident from a reading of the above acts of Congress, that, in cases of error at law and appeals in equity, the statute itself has in express terms defined the requirements and regulated the proceedings in such cases, and it is a truism to say that no rule of Court can add to or subtract therefrom. While in respect to appeals in admiralty from the District to the Circuit Court, the Act of Congress has made no regulation whatever; except the appeal, when taken, must be to the next term of the Circuit Court, leaving the courts, by their rules, to prescribe in respect to the time of taking and perfecting appeals.

Were any authority needed for this manifest distinction between writs of error and appeals in equity from the Circuit to the Supreme Court, and appeals in admiralty from the District to the Circuit Courts, the case in 3d Mason, 443, above cited, would serve as an admirable illustration. Summed up, it holds:

1st. That, in respect to appeals from the Circuit to the Supreme Court, the statutes have prescribed the *time* with-

in which they may be made, and the *mode* in which it is to be done, and that it is incompetent for the court to annex further conditions or requirements, and

2nd. That, in respect to appeals from the District to the Circuit Courts, Congress having made no provisions except as to the term of the Circuit Court *to which it may be taken, it is competent for the District Court by rule to prescribe the times and modes of making them.*

Next, in respect to the omission to file a bond in the cases in the 2nd Wall. 96, and 5 Wall. 822, which were appeals in equity from the Circuit to the Supreme Court, it is necessary to call the attention of the court to the fact that the Acts of Congress, heretofore quoted, in respect to appeals in equity from the Circuit to the Supreme Court, which define the requirements of such appeals, and regulate the time and the mode of taking the same, nowhere specify the giving of a bond as one of the jurisdictional acts essential to be done by the appellant to perfect, as far as his acts are concerned, his appeal. Repeating here the language of the statute in respect to what is required of the appellant, we call the special attention of the court to it, viz:

After prescribing the limit of five years for an appeal—
"Whereto shall be annexed and returned therewith, at
"the day and place therein mentioned, an authenticated
"transcript of the record, an assignment of errors and
"prayer for reversal, with a citation to the adverse party,
"signed by the judge of such * * court, or a justice of
"the Supreme Court, the adverse party having at least
"* * days notice."

This clause above quoted, specifies all the acts which the appellant must do or cause to be done, in order to perfect his appeal, and the act of Congress itself having enumerated the acts to be done or caused to be done by the appellant, it is not to be maintained that the court, by a rule, may add a new requirement to such enumeration. The absence of the giving of a bond from such enumeration, is the sole ground for the decisions in Wallaceabove referred to.

Coming down to the last clause of the Act of Congress in respect to appeals, we find the following, viz:

"And every justice or judge signing any citation on "any writ of error (or appeal,) as aforesaid, shall take good "and sufficient security," &c.

In short, the provision in relation to a bond in respect to an appeal from the Circuit to the Supreme Court, is a mere direction to the court to take such a bond, and is not prescribed as one of the acts to be done by the appellant, for which he is to be held responsible. In the words of the Supreme Court, in 5 Wall., 822, in respect to the appellant himself, and the requirements which he is obliged to fulfill under the Act of Congress regulating appeals from the Circuit to the Supreme Court, we say,

"What is essential to an appeal is allowance, citation to "the appellees, or equivalent notice or waiver, and the "bringing up of the record at the next term of this Court;" but, that "security for prosecution should be taken by the

"judge on signing the citation; but if this duty be omitted or defectively performed, a remedy can be applied here on motion."

Clearly, therefore, if the decision of the Court in 5 Wall. 822, be read in connection with the statute in respect to appeals from the Circuit to the Supreme Court, it is in perfect harmony with the position we maintain in the case at bar; for, when summed up, it holds I—that, under the statute regulating appeals from the Circuit to the Supreme Court, the only essential jurisdictional acts, are:—1st. Allowance. 2nd. Citation to the appellees, or equivalent notice or waiver, and lastly, the bringing up of the record at the next term of the Supreme Court. II. That the duty of taking security is one imposed upon the judge and not upon the appellant, and hence is not jurisdictional, but curable on motion. This is familiar law and is affirmed as a matter of every-day occurrence in both State and national tribunals.

Had the Act of Congress which the Court was here construing, provided that the appellant must give bond for his appeal within any specified time, as a jurisdictional act of his own upon the performance of which the perfecting of his appeal depended, a holding that a failure on the part of the appellant to file the bond within the prescribed time, was not fatal, would have been in the face of a line of decisions, State and National, so numerous that an attempt to collect them would be a labor beyond the province of this brief.

We cite simply—

The Dos Hermanos, 10 Wheat. 306.

A case of appeal in equity from the Circuit to the Supreme Court, holding that the Act of Congress which directs the judge to take security, leaves the time and manner of taking it to his discretion.

One further suggestion alone is necessary, viz.: That no authority can be necessary to the point that the Act of Congress itself having prescribed, in appeals from the Circuit to the Supreme Court, the time and the mode in which such appeals shall be taken, defining what acts are essential and jurisdictional, it is not competent for the court, by rule, to add to such essential and jurisdictional acts, and this in substance is what the case in 5 Wall. above holds.

In the case at bar, however, it is just as clear and indisputable that where, as in cases of appeal from the District to the Circuit Court—the case at bar—the Act of Congress provides nothing in respect to the time or mode of taking appeals, it is competent for the District Court to regulate the time and mode of such appeals by rule or special order in particular case and that such rule or order has the force and effect of statute, see:

Act 1792, ch. 36.
" 1793, " 22.
" 1789, " 20.
3 Mason, 443.
3 Sumner, 495.
1 Black, 522.
1 Abb. Adm., 422.
8 Peters, 262.
14 " 448.
12 " 472.
9 " 329.

The next case referred to by claimants counsel, 20 How. 261, is entirely in our favor; the court on motion dismissed the appeal because the rule of the Supreme Court requiring a transcript within the first six days of the term was not complied with. The statute gave the right of appeal at any time within five years. The appeal was made in time but the transcript was not filed within the first six days of the term, although it was filed within five years, and the court dismissed the appeal for non-compliance with the rule.

The case in 23 How., 1, was the same kind of a case as that in 5 Wall., 822, it being a case of appeal from the Circuit to the Supreme Court where no bond was given. It was there held as in the case in 5 Wall. that the taking of a bond was the duty of the Judge and was not one of the jurisdictional acts required of the appellant.

In the case in 6 How., 112, referred to by claimant's counsel the rule is laid down which we in nowise question. This case affirms that where the laws of Congress (or rules made under and authorized by such laws) define the requirements of an appeal, the courts below cannot change them. It holds, also, that it was unnecessary to petition the District Court to grant an appeal as an appeal was a right given by law which the court could not refuse. That the court could not prescribe the time or manner in which the record was to be transmitted since that was regulated by the Acts of Congress, and that where the time and mode are regulated by Act of Congress the court can neither change or modify such regulations. The counsel for claimant failed to quote the concluding paragraph of

this decision which dismisses the appeal because a proper citation to counsel had not been given and holds this as well as all the other requirements to be jurisdictional. We ask the court to read the whole of this concluding paragraph of this decision.

III. It was next claimed by the counsel for the claimant that an appeal will not be dismissed on account of irregularities. The first case referred to under this head is 94 Otto, 112. This is an appeal in equity from the Circuit to the Supreme Court. It holds that an appeal will not be dismissed for the *non service* of the citation. This holding in nowise militates against the doctrine which we are maintaining in the case at bar.

Referring again to the statute which regulates appeals from the Circuit to the Supreme Court we find the only requirement to be "*A citation to the adverse party, signed* "*by the Judge of such Circuit Court or a Justice of the Su-*" *preme Court.*" There is no requirement or provision in respect to the *service* of this citation except that the act provides that the adverse party shall have at least thirty days notice before the case is brought on for re-examination in the Supreme Court.

The court in this case therefore very properly holds that there being in the case a citation to the adverse party signed by the Judge as required by law, service could still be made, and after thirty days the case proceded with.

This case therefore contains no such anomalous doctrine as that a jurisdictional act may be dispensed with either by the parties or by the court.

The case in 10 Peters, 24, is a case of the construction of a rule of the Supreme Court as to the docketing a cause. It has no jurisdictional question in it and has no application to the cause at bar.

1 Wheat. 305, 361-2. Appeal from Circuit to Supreme Court. No bond given. Held as in 5 Wall., 822, that the giving of a bond is not a jurisdictional act required of the appellant but a duty imposed upon the court. Our comments on the case in 5 Wall. fully apply here.

The case in 20 How., 252, asserts the control of the court over its own rules, and is no more than the District Court itself asserted in the case at bar when it extended the ten days for perfecting the appeal prescribed by its rule to twenty days by a special order in this case. In other words the right of modifying the rule of the District Court by extending the time of perfecting the appeal in this case by special order, resided in and was within the jurisdiction of the District Court alone. That power the District Court in fact exercised. This court has no power to regulate the question of appeals from decrees of the District Court either as to time or as to mode since that power resides exclusively in the District Court. See last clause of the decision in Norton vs. Rich, 3 Mason, 443.

The case in 20 How., above referred to, asserts no power of control in one court over the rules of another court of

matters exclusively within the jurisdiction of that other court.

IV. It was further claimed that an appeal is a matter of right and cannot be restricted by rule or order of court.

It is true of course in cases where by law appeal is allowed, that the appeal is a matter of right within the re-restrictions and limitations imposed by statute or by rules of court having the force and authority of statutes, and not otherwise. For the converse of the proposition is also true ; that the vested rights of a party in the judgment or decree of a court of competent jurisdiction are not to be disturbed except in the manner prescribed by law or by rules having the force of law.

The case in 6 How., 112, referred to under this head simply holds that where the statute has limited the time wherein an appeal can be perfected it is incompetent for the court to extend the time, which is familiar law.

The case in 18 How., 530, is unimportant upon this point but will be considered under the sixth head.

In the case in 1 Woods C. C., 593, it appeared that no notice of appeal was entered upon the docket or minutes of the court, but that such notice was given orally in open court at the time such decree was pronounced.

It is to be remarked that the Act of Congress requires no notice of appeal to be entered upon the docket or minutes of the court, and it is to be presumed that there was no

rule of the court for the Southern District of Alabama requiring such entry since no such rule is referred to in the opinion of the court. The court therefore holds that since an appeal is a matter of right, and since it was taken and allowed in open court at the time of the decree, and bond given before adjournment, the appeal was perfected in accordance with the established practice of Courts of Admiralty as set forth in the case of Norton vs. Rich, 3 Mason, 443, an authority already used by us in support of our position in this case. The other authorities referred to in this decision are appeals from Circuit to Supreme Court, and hence under a different rule.

V. It was also claimed by the counsel for the claimant that no appeal in writing is necessary and that all that is required is the giving of the bond and taking up the record to the next term of the Circuit Court.

It would be sufficient to dispose of this proposition to say that the 23rd rule in Admiralty of the court in this District provides otherwise and that such rule having in every respect the force of law is a trifle more decisive of the question than the assertions of counsel. That rule provides that in this District an appeal in Admiralty from the District to the Circuit Court must be in writing, &c., and that when it is filed and bond given the appeal is perfected and not before. The special order made in this case by the District Court provided in express terms that the claimant must perfect his appeal within twenty days from the date of said decree, to-wit :

Dec. 26, 1877, and rule 23 of the District Court above referred to declares that the filing of an appeal in writing and the giving of a bond are both necessary to the perfecting of an appeal. Clearly, therefore, this appeal was not perfected as required by law and, therefore, in the language of Judge Story, in the case of the Steamboat New England, 3 Sumner, 495: "No appeal subsequently "taken by the party, even if offered or entered before the "next term of the Circuit Court, is understood to possess "any validity; but it is treated as a mere nullity."

The case in 18 How., 530, referred to under this head by the claimants' counsel has no application to the case at bar, since that was a case of appeal from the Circuit to the Supreme Court, in which the requirements are totally different under the Acts of Congress from the requirements in appeals from the District to the Circuit Court under our rules. It is admitted, of course, that the Act of Congress regulating the mode of appeals from the Circuit to the Supreme Court does not require such appeals to be in writing and the court was right in so holding. The Act of Congress also allowing in such cases an appeal at any time within five years, and an appeal having in fact been prayed in open court it was competent for the court at the next term (the time for appeal not having yet expired) to enter an order *nunc pro tunc*, showing the fact of a prayer for an appeal, at the former term, and its allowance. It was also held that for the facts the certificate of the clerk was equally competent with the record itself.

What application any of these principles have to the case at bar, is beyond our power to see.

We have already commented on the case in 1st Woods, C. C. 593, under another head.

VI. It was further said by counsel for claimant, that the court can know nothing, judicially, of a case outside the record.

In a general sense this is true, but what aid or comfort for the claimant lies in the proposition, we are unable to see.

In the case in 18 How., 534, the court held that the record showing that an appeal was taken in open court, nothing could be received to impeach it.

Instead of working in favor of the claimant, this doctrine is in our favor. In that case the record and certificate showed jurisdiction in the Supreme Court, and that court held that it was not to be impeached *aliunde*. The trouble with the record in this case is, that the burden of showing jurisdiction in this court, being on the appellant, there is a total absence of the facts and proceedings essential to confer jurisdiction upon the court. The certificate of the clerk, attached to the record, shows that the record contains a full and complete transcript of all the proceedings had in the District Court in this case.

In order that this court should obtain jurisdiction of this appeal, it was necessary that there should have been filed in the District Court on or before January 15th, 1878, an appeal in writing. No such appeal appears in the record,

nor is the fact anywhere certified in this record that such an appeal, in writing, was in fact filed in the District Court. The filing of such an appeal, in writing, in the District Court, being an essential jurisdictional act, the failure of the record to show the performance of such act, is fatal to this appeal.

We admit, of course, that if such act had been performed in fact, and by mistake the record failed to show it, the court, on suggestion of diminution, would send the record back to the District Court to be perfected. But, it is conceded upon all hands that no such appeal, in writing, was ever filed in the District Court in this case; but the records of the Circuit Court show that such an appeal was filed in this court on the 27th day of February, 1878; a month and twelve days after the time for filing such appeal in the District Court had expired.

VII. It was claimed, in addition, that entering an appearance on appeal or writ of error, without giving notice of an intention to take advantage of an irregularity in the citation, is a waiver of such irregularity.

Several authorities are referred to in support of this proposition.

Without any authorities, it would be conceded to be good law.

A citation, of course, is only required in cases of appeal from the Circuit to the Supreme Court, there being no such process in appeals from the District to the Circuit Court.

A citation is, in all essential particulars, a summons, and that a general appearance in a case is a waiver of all defects in the summons, and puts the party in court, is too old law to be a subject of comment.

The proceedings of the Circuit Court upon the motion to dismiss the appeal were a little peculiar. The motion to dismiss was filed and came up duly for hearing and was fully argued by counsel for both sides; and the court being fully advised, dismissed the case upon the ground that no appeal had been perfected as required by the rule of the District Court.

Later, a motion was filed by opposing counsel to re-instate the case, based chiefly upon the fact that the counsel for the appellant here had, by his conduct in the Circuit Court, conferred jurisdiction upon that Court notwithstanding an appeal had not been lawfully taken. The Court will find [Record, pages 215, 216, 217 and 218] the affidavits setting out the acts of counsel which it is claimed gave jurisdiction to the Court notwithstanding no appeal had been perfected. The facts appear to be, substantially, that the counsel for the appellants here had expressed a willingness to try the case in the Circuit Court at a given term, and that it should be specially set for a particular day to accommodate foreign counsel; that after a motion to dismiss the appeal had been filed in the Circuit Court by counsel for the appellants here the opposing counsel desired to take certain depositions to be used upon the trial of the case in the Circuit Court, and that counsel for the appellants here requested the Circuit Court first to dispose of the motion to dismiss the appeal before

said deposition were proceeded with, and that the Court suggested that the depositions might be taken and the motion subsequently disposed of; and upon such suggestion of the Court counsel for appellants here appeared in the examination of the witnesses before the officer taking said depositions.

It is apparent at once, of course, that there is no claim that the defeated p rty in the District Court was prevented from perfecting his appeal to the Circuit Court in accordance with the requirements of the rule of said Court, by any mis c nduct or act of the successful party or his counsel. It is simply claimed that, the defeated party having failed to perfect an appeal in accordance with the positive provisions of the rules, the successful party has conferred upon the Circuit Court the right to reverse the decree in his favor, by the mere statement of his counsel that he was willing the case should come up at a certain term of Court, (whether upon the merits or otherwise, not stated) and that a particular day should be set therefor, and also, at the suggestion of the Court, consenting to appear at the taking of a deposition while his motion to dismiss was on file, but before it was disposed of. It is also to be observed that there is no pretense that there was any intent upon the part of anybody to waive any rights, or that either party by the conduct complained of has lost any privilege, advantage or opportunity which he otherwise would have had.

If a waiver were possible, which we absolutely deny, it seems to us that to hold that anything had been waived under such a state of facts, is entirely unwarranted.

And in this connection we wish to call attention to the late case of

Grigsby vs. Purcell, 9 Otto, 505,

Which seems to us decisive of the whole matter in controversy.

This was an appeal in equity from the Circuit to the Supreme Court, wherein, as we have already said, appellants were entitled to the whole of the ensuing term for perfecting their appeal. The decree appealed from, was rendered at the February term, 1875, of the Circuit Court. The appeals were not docketed, nor the transcript filed, till after the close of the succeeding (October) term, 1875, of this court. Nothing further was done in the case by either party until December, 1878, when the appellees moved to dismiss the appeal of Grigsby and wife because it was a joint appeal, the appellants not being united but opposed in interest. This motion was overruled. The attention of the court was not called to the delay in filing the transcript and docketing the appeals until January, 1879, when the causes were reached in their regular order on the docket. Counsel for appellees then suggested the delay and moved to dismiss on that account.

The language of the opinion, sustaining the motion to dismiss, and holding that a general appearance on the part of appellees does not constitute a waiver of the objection, is noteworthy—

"Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient

excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed.

"After the cases of Hamilton vs. Moore and Blair vs. Miller, an attempt seems to have been made in Wood vs. Lide, (4 Cranch, 180,) to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in Edmonson vs. Bloomshire, we considered the practice so well established as to make it better 'to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century.' There are, however, exceptions to the rule, as in United States vs. Gomez (*supra.*) where there was fraud, and in United States vs. Booth, (21 How. 506,) where the State court to which the writ was directed ordered the clerk to disregard the writ and make no return; *but in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence.*

"These appellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances, would be

to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them.

"It by no means follows, as seems to be supposed by counsel who resist this motion, that if parties appear and without objection go to a hearing of a cause docketed after the return term, our judgment will be void for want of jurisdiction. The real objection is not that this court has no jurisdiction, but that the plaintiff in error, or the appellant, as the case may be, has failed to duly prosecute his suit; and this objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time."

Without regard, then, to the question of jurisdiction, we submit that in accordance with the principle of the above case, the delay of our opponents to duly prosecute their appeal by filing the notice, was fatal; and the ruling of the Circuit Court that subsequent acts of counsel for appellants here constituted a waiver of our and this court's objection to this laches, was wrong.

The brief of counsel for claimant, which has just been submitted to us, contains certain few matters which we will here comment upon. It starts out with the proposition that our Bill of Exceptions, duly allowed, signed and sealed by the Circuit Judge, (Record, pp. 212, 213,) based as it is solely on the action of the Circuit Court in overruling our motion to dismiss the appeal to that court, was taken too late to enable us to urge our exception here. In other words, that a similar motion had been filed and overruled at the previous term of the Circuit Court, and the Bill of Exceptions should have been taken at that term if at all.

In reply to this we submit—

1st. That the Bill of Exceptions shows upon its face that the motion was overruled on the ground of waiver, and not because a similar one had been previously filed or passed upon.

2d. *Non constat* that the evidence adduced on the hearing of the second motion was the same or confined within the same limits as that brought forward in support of the first.

3d. Instead of striking off our second motion, as the court would have done had it been impertinent, as counsel claim, it was formally heard on its merits and overruled, and our exception allowed.

4th. In addition, we call the attention of the court to the fact that at the time of the overruling of the former motion—March 16th, 1878, (Record, p. 198)—we excepted

thereto, and our exception was entered on the journal. (Exhibit I to Bill of Exceptions, Record p. 219).

Counsel for claimant are thus attempting to occupy positions diametrically opposite, by insisting that our exception to the ruling of the court, duly recorded, avails us nothing; and at the same time, in that part of their brief which deals with the measure of damages, claiming that their own appeal brings up the entire record to this court in such wise, that their failure to except at all to the confirmation of the master's report, or to bring any bill of exceptions whatever here, on their appeal, does not prevent their going into the merits of the case in this court. (See p. 34 *infra*.)

In their discussion of the facts bearing on the question of our waiver of objection to their appeal, counsel make statements unwarranted by the record. They say that counsel for libellants agreed in open court, on March 3d, 1878, that the cause should be tried at a day certain. All the proof offered on this subject is contained in the affidavits marked "Exhibits E and F," attached to the Bill of Exceptions, (Record, pp. 216, 217,) wherein nothing is said as to the place where the alleged agreement was made.

It is said that counsel for libellants appeared at the taking of depositions in the Circuit Court and cross-examined, before his motion to dismiss the appeal was filed. On this subject, also, all the proof offered is contained in the affidavits attached as exhibits to the Bill of Exceptions. (Record, pp. 215 to 213.) There is not a word tending to show that this action of counsel was had before the filing of the motion; the affidavits expressly show the contrary.

It is said that "a writing, such as is in the 23d Rule, called an appeal," was filed by claimant's attorneys on Feb. 27th, with a person who was clerk of both the District and the Circuit Courts; and this is said with the evident object of implying that the error committed in filing it in the latter, instead of the former court, was chargeable to the clerk rather than to claimant.

Exhibit "J," to Bill of Exceptions, (Record, p. 220,) is a transcript of this pretended notice of appeal, and shows its caption to be "In the Circuit Court;" and that it was in fact filed therein, was found by the Judge of that Court. (Record, page 213.)

We have already (pp. 26, 27, *supra*.) sufficiently discussed the effect, as a waiver, of the facts actually disclosed by the record herein; and what we have said in pages 9–25, inclusive, relieves us of any necessity of direct reply to our opponent's claim that it is discretionary with the Circuit Court to disregard the rules of the District Court, and that the exercise of this discretion is final and cannot be reviewed here.

II.

We are informed by opposing counsel that they propose to ask for a reversal of the action of the Circuit Court in confirming the report of the master to whom the case was referred in that court to ascertain the damages. (See Report, Record, p. 221). The point to which they object is this: The going rate of freight during the time of detention of the claimant's vessel (the Osborne) after the collision was $4 per ton. The Osborne was under charter for the season at the rate of $2 per ton. The master computed her damages on account of this detention on the basis of the charter rate of $2, instead of the going rates.

The claimant excepted to this finding of the master. (Record, p. 224-5). The Circuit Court overruled the exceptions and confirmed the report. (Final Decree, Record, p. 263).

As the claimant has failed to except to the action of the Circuit Court in confirming the report, any discussion at this time of the merits of the report seems superfluous. Were the question before this court, we should rely upon—

Williamson vs. Barrett, 13 How., 101—vid. pp. 111, 112—

in support of our view of the correctness of the ruling below; but, as the claimant has in this instance, as well as in that of his former appeal, let pass his day of grace, we consider it too late for him to import into his brief a matter which has no place in his bill of exceptions.

Respectfully submitted,

H. L. TERRELL,

Proctor for Appellants.

OFFICE SUPREME COURT U.S.
FILED
MAR 2 1882
JAMES H. MCKENNEY

Supreme Court of the U. S.

WINSLOW & WINSLOW, *Appellants*,
vs.
WILCOX, OWNER AND CLAIMANT, OF THE SCHOONER "OSBORN."
No. 243.

IN ADMIRALTY ON APPEAL FROM THE CIRCUIT COURT OF THE NOTHERN DISTRICT OF OHIO.

Supplementary Brief for Appellants.

A. G. RIDDLE, *of Counsel.*

THE APPEAL AND WHAT IT BROUGHT HERE.

The Plaintiff's appeal from so much of the decree and ruling of the Circuit Court, as adjudges that the case was properly appealed from the district court, into said circuit court, by said Wilcox, owner and claimant; also from so much as found that the collission complained of, was by the mutual fault of the vessels named, and decreed damages and costs accordingly. (Rec. p. 266.)

The record does not contain findings of fact by either of the courts below; nor any exceptions to the ruling of the circuit court, on the merits of the case; and hence the only question open here, is as to the appeal from the district to the circuit court.

Was that appeal perfected under the rules and practice governing appeals in admiralty?

Did the circuit court acquire jurisdiction of the case?

NOTE.—The record shows that Wilcox, appellee, gave notice of his intention to appeal, also, he gave appeal bond, but took no steps in his appeal; although the briefs, of counsel, for both parties treat the case as here on his appeal also. I suppose that matter is not open to him. (Rec. p. 263, 267.)

HOW THE QUESTION AROSE.

The Winslows, owners of the schooner "American Union," libeled the schooner "S. S. Osborn," for colliding with the "Union," August 9th, 1872, and claimed damage and demurrage, $8,500. (pp. 3, 7.)

Wilcox answered, denying negligence, and counter libeled for $17,000 and demurrage.

The case was referred, depositions taken, and report in favor of the Winslows, $4,030, which included interest. (p. 175.)

Exceptions to this report and decree for the amount, and cross libel dismissed. (p. 179.)

The decree was made December 26, 1877. Wilcox gave notice of appeal, and bail ordered in $8,000.

Time for perfecting appeal was extended twenty days from date of the decree. Bond for the appeal was given in time. Id.

February 27, 1878, the transcript was filed in the circuit court, and with it was also filed an appeal, pointing out the matter complained of. (Rec. p. 180, 81.)

No other act or thing was done in the district court, in the matter of this appeal.

This was no compliance with the 23d rule of the District court, prescribing the mode of appeal. (See Rec. pp. 213, 214.)

March 12th, the Winslows motioned to dismiss the appeal for disregard of the rule. (Rec. p. 181.) Which was heard and allowed the same day. (Rec. p. 196.)

On the 13th, Wilcox filed his motion to vacate the last order, and reinstate the case. (Rec. p. 191.)

This motion was allowed the next day, and the Winslows excepted. (Rec. p. 198.)

At the ensuing term, June 12th, the Winslows repeated their motion to dismiss. September 19, this was heard and overruled. (Rec. pp. 211, 212.)

To this decision formal exceptions were taken, to which is appended as exhibits, the various papers used on the hearing, among them Ex. A. sets forth the 23d rule. (Rec. pp. 211 to 221.)

ASSIGNMENT OF ERRORS.

The circuit court erred in reinstating the case after dismissing the appeal.

It erred in overruling the second motion to dismiss.

It erred in retaining and adjudging said case.

REMARKS.

It is not my purpose here to discuss the authorities bearing on the general proposition. That has been exhaustively done by the original counsel in the case. To these reference will be made.

Among the points to which the attention of the court will be invited, is—

First. The matter of taking an appeal is purely and entirely the act of the party, as much and in the same sense, as the commencement of a suit. In each case he uses the implements furnished by the law and rules of

court. Without them he cannot in either case get into court. The action is his. Hence he has his action. In admiralty there are special reasons why he must act to secure an appeal.

The law authorized an appeal. The court under the law furnished the only instrumentalities by which this could be done; neither he nor the court could work an appeal in any other way. An appeal is not matter of law nor of ordering by the court, and neither can supply the want of action by the party.

This is not a case of being mislead by the court, or opposing party, but one of sheer doing nothing, by the would-be appellant. The paper he filed in the circuit proves that he thought it an essential thing. He thought he had appealed from the district to the circuit court. He now thinks he has appealed from the circuit to this court.

Second. Giving bail and filing the transcript are not an appeal, nor are they part of an appeal. Giving bail may be wholly dispensed with. When required it is an important incident. Sometimes necessary to render an appeal effective. It is like giving bail for costs at the commencement of a suit, when that is required. This, like the matter of filing a transcript, is often permitted, out of rules, to give effect to an otherwise perfect appeal. When a man has in good faith placed himself and case within the jurisdiction of a court, it will help him to stay there; but he must first put himself within that jurisdiction by *his own* act.

Cases where appeal bonds and transcripts were permitted to be filed out of rule to perfect an appeal, do not help a case where no appeal was taken by the party.

Third. The court held that the appeal was irregular, but that the Winslows by their conduct, waived or cured this irregularity. This ground is distinctly abandoned by the brief. (p. 7, par. 3)

Counsel here contend that as the right of appeal was given by law, and the manner fixed by rule, the court could waive the rule.

It is not necessary to discuss this matter, for the court did not attempt to waive or suspend the rule. It held it to be in force and applicable; and said that the Winslows had waived the non-compliance with it, which the counsel now say was untrue and furnished no reason for the action of the court, in the premises. The brief spends its learning and strength, both very considerable, to show that the court might have done what it did not do; and also that the 23d rule, which prescribes the manner in which the right of appeal may be exercised, is void, as impairing the integrity of the statute authorizing appeals.

Unquestionably in an extreme case, like that in 20 How. *a court can suspend its own rules*, to save the rights of a party not in fault. But the argument is to show, that the circuit court, might have suspended the 23d rule of the district court—which it did not do—in favor of a party guilty of pure and gross inadvertence.

No case of this extent exists.

How absurd to argue that a suspension of rules was a matter of descretion and not reviewable; when as stated the court did not pretend to suspend the rule. Let me give the language of the court, in setting aside the order, dismissing the appeal.

The court "doth find that notwithstanding said appeal was not perfected in accordance with the rules of said district court; yet the court, being of opinion that the irregularity in said appeal has been waived by the appellees, doth order that this cause be reinstated on the docket of this court."

In the face of which are eleven pages of closely packed learning and citation of authorities to show that the court might have suspended the rule, and that the rule itself was invalid.

The question recurs, shall the party himself take his appeal; or shall he do nothing and the court eke out an appeal for him, in spite of the rules which he has disregarded, and which the court did not suspend. It is not the case where the court gives an insufficient reason for a decision. It did not decide as alledged.

Fourth. With my view that Wilcox is not an appellant here, and the appeal of the Winslows does not open the record to him; I make no points on the case which his counsel affirmatively discuss in their brief, and which are sufficiently replied to.

A. G. RIDDLE,
of Counsel.

SUPREME COURT U.S.
FILED
JAN 23 1882
JAMES H. McKENNEY, CLERK.

IN THE

Supreme Court of the United States.

No. 243.

WILLIAM G. WINSLOW & HEZEKIAH J. WINSLOW,

LIBELLANTS AND APPELLANTS,

VS.

BLISS O. WILCOX,

(Owner and Claimant of the Schooner S. S. Osborn,)

CROSS LIBELLANT AND CROSS APPELLANT.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR CROSS LIBELLANT AND CROSS APPELLANT.

L. PRENTISS, *Claimant's Proctor.*

JACOB D. COX, *Counsel.*

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IN THE

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(Owner and Claimant of the Schooner S. S. Osborn,)
CROSS LIBELLANT AND CROSS APPELLANT.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT OF THE CASE.

The statement of the case in the libellant's brief, being incomplete, a full and complete statement of the case is herewith appended, with references to the record. On December 26th, 1877, a final decree in the original cause was entered in the District Court, from which decree the claimant and cross-libellant, Wilcox, at the time of entering the decree, prayed in open Court an appeal to the next term of the Circuit Court, which appeal was allowed, and the amount of the bond fixed in and by the terms of said decree (p. 179).

The bond was given within the time fixed by the Court, and on the 27th day of February, 1878, a proper transcript of the re-

cord and proceedings of the District Court, and also a writing, called an appeal, were filed with Earl Bill, who was at that time Clerk of both the District and Circuit Courts of said Northern District of Ohio, and who filed the same in the Circuit Court (pp. 181, 197, 198, 213).

The next term of the Circuit Court, after the decree, commenced January 7th, 1878, and ended April 1st, 1878.

On March 4th, 1878, the appealed cause was regularly called on for trial in the Circuit Court, and counsel for both parties agreed that the cause should then be passed and should be taken up for trial on the 11th or 12th of March, (p. 197).

On the 11th of March, 1878, testimony in the cause was taken, by consent, by both parties to the cause, before Earl Bill, as commissioner of said Circuit Court, and was filed in Court on March 12th, 1878 (p. 182, 197).

On March 11th, but at what hour of the day does not appear, the libellants filed a motion to dismiss the appeal, on the ground that no written appeal had been filed in the District Court within the time required by the 23d rule in Admiralty of the District Court, which rule is set forth in full in the libellant's brief (p. 181).

On March 12th this motion was summarily heard and granted by the Circuit judge, and the appeal was ordered to be dismissed (p. 196).

On March 15th a motion was filed in the Circuit Court by the appellant, Wilcox, to vacate the order of dismissal, and to reinstate the appeal upon the docket for trial, on the following grounds: 1st. That notice of appeal was given, and the appeal allowed in open Court, at the time the decree was entered by the District Court, on the 26th day of December, 1877, as shown by the decree and the record (p. 180), and

that bail for appeal was duly given within the time named in the decree for so doing (p. 197). 2d. That the Winslows had waived any irregularities, if any existed, in the taking of the appeal, by appearing in the cause in the Circuit Court, on the 4th of March, and agreeing in open Court that the trial on the appeal should be had on the 11th or 12th of March, and by appearing and cross-examining witnesses whose depositions were taken in the cause in the Circuit Court, on the 11th of March, before any motion to dismiss the appeal was filed, and by taking testimony in their own behalf, and that the appellant, Wilcox, had gone to great expense in preparing for trial, after the appearance of the Winslows in Court on March 4th, 1878, and before their motion to dismiss was filed. 3d. That on February 27th, 1878, a writing, such as in said rule 23d is called an appeal, was filed by the appellant, Wilcox, with Earl Bill, as clerk of both the District and Circuit Courts of said Northern District of Ohio, being the same day on which the transcript and papers in the cause were transmitted by said clerk from the District to the Circuit Court (p. 197).

On March 16th this motion was heard, and granted, on the ground that any irregularity in the perfecting of the appeal had been waived by the appellees; and the appeal was accordingly reinstated, and by order of the Court the cause was continued to the next term (p. 198).

To this order reinstating the appeal the libellants, excepted, but took no bill of exceptions (p. 198).

The libellants at the next term, on June 12th, 1878, filed another motion to dismiss the appeal, predicating the same on exactly the same grounds embraced in their former motion (p. 205).

This motion was resisted by the appellant on the same grounds as before, and on the additional ground that the

whole subject matter of the motion had already been heard and decided by the Court (p. 206).

At the following term of the Court this second motion was, on September 19th, 1878, heard and overruled, upon the same ground as before, to which the libellants excepted and took their bill of exceptions, which appears in the record (pp. 211, 212).

A d thereupon, on September 24th, 1878, the cause was heard in the Circuit Court on the appeal, and the Court found as matter of fact that the collision occured by the mutual fault of both vessels, and on this finding of fact decided as matter of law that the damages of both vessels should be equally divided. The cause was thereupon referred to a special master to take testimony and report to the Court the amount of damages suffered by each vessel, and to make a division thereof according to the decree, and the case was continued (p. 221).

The report of the master, Ricks, was filed March 4th, 1879, finding the facts to be that the vessels were both chartered in 1871 for the entire season of navigation of 1872, and that the rates of freight for the part of the season of 1872 subsequent to the collision were twice as high as the rates provided for in the charters (p. 221 to 224); and that the master adopted the charter rates as a rule of damages, but, at the request of Wilcox, he found and reported what the amount of damages would be if the current rate of freight, instead of the charter rates, were adopted as the rule of damages.

The claimant, Wilcox, as appears by the master's report (p. 260), objected to the introduction of the charters as evidence, and also to their being adopted as a rule of damages.

Exceptions to the master's report were filed by the claimant, Wilcox, on March 10th, 1879 (p. 224), on the ground that the master erred in finding and reporting that he was not entitled

to recover the value of the use of the schooner Osborne, during the time she was delayed in consequence of the collision, at the current rates of freight, less ordinary expenses; in admitting said charters in evidence, and in finding and reporting that said charters controlled in fixing the damages for such delay, and to the amount found due to the claimant on the basis adopted by the master.

On March 15th, 1879, the exceptions of Wilcox to the report were heard and overruled by the Court, and the master's report was adopted and confirmed, and the final decree of the Circuit Court was entered, from which decree both parties appealed (p. 263, 264).

The questions of law arising upon the record are:

FIRST. Whether the Circuit Court erred in overruling the motion of the libellants to dismiss the appeal; and reinstating the case.

SECOND. Whether the Circuit Court erred in overruling the exceptions of the claimant, Wilcox, to the master's rereport, in regard to the amount of damages allowed him, and the rules of law applied in estimating them.

All other questions of law in the case are subordinate to these two, and are important only as they bear upon them.

We allege that the Circuit Court erred in overruling the exceptions of the claimant, Wilcox, to the master's report, and in adopting as the rule of damages the rule adopted by the master in his report.

On the part of the Winslows it is claimed that the Circuit Court had no POWER to receive or entertain the appeal, for the reason that Wilcox did not, in *addition* to claiming his appeal and having the same allowed in open Court, in the

decree, and giving bail within the time fixed by the decree, file a writing, called an appeal, in the District Court, containing the various statements referred to in the 23d rule of that Court.

Before discussing this question, we call attention to the fac that the bill of exceptions upon this question was taken at a term subsequent to that at which the motion was overruled. The filing of the second motion to dismiss the appeal was wholly invalid, all the matters embraced in it having been heard and determined at a previous term of the Court. The law is well settled that no bill of exceptions can be taken at a term subsequent to that at which the decision excepted to was rendered.

Zeller vs. Eckert, 4 *Howard*, 289, 298.
Lathrop vs. Judson, 19 *Howard*, 66.
Burton vs. Forsyth, 20 *Howard*, 532.
Muller vs. Ehlers, 91 *U. S.*, 249.

Counsel is mistaken in supposing that we claim they took no exceptions to the overruling of their motion at the January term. We do not; but do claim that the bill of exceptions at the next term is void. The authorities, which we hereafter cite, show that no exception is necessary where the record otherwise shows the question sought to be raised.

A question once deliberately decided by the Court is not considered open for discussion, on a subsequent proceeding in the same cause; and, therefore, a second motion on the same grounds cannot be considered.

1 *Peters*, 547.
Wright vs. Sill, 2 *Black*, 544, 3 *Wallace*, 332.
5 *Howard*, 382.

We do not deny that *a* motion to dismiss may be filed at any time before hearing, but manifestly this does not give the right to file the same motion again and have a second hearing; for if it could be done a second time, it might be repeated twenty times, and as many bills of exception taken. If this could be done there might be just as many motions to reinstate, for the question is the same in each case; and clearly nothing of this kind can be done.

Rogers vs. Law, 21 *Howard*, 526.

If more than one motion can be filed, it can make very little, if any, difference in this case; for in either event the overruling of the motion to dismiss the appeal involved a finding of *fact* as well as *law*. Whatever the parties may have done which tended to show a waiver of any objection to the appeal would be matters of *fact*, some of which were known to the Court independent of any evidence offered, and in the decision of the second motion the Court would necessarily pass upon the evidence and decide as to the *facts;* and it is well settled that findings of *fact* cannot be reviewed by this Court under the statute of 1875.

The Abbotsford, 98 *U. S.*, 440.
The Adriatic, 103 *U. S.*, 730.

The *reason* given by the Court for overruling the motion to dismiss is of no consequence; for a correct decision cannot be disturbed, even if no reason or a wrong one, was given. In this case the Court gave one good reason; but the decision itself is none the less supported by every other legal ground or reason authorizing it; and, as the finding of fact cannot be reviewed by this Court, it follows that the only question which can be raised here is whether the Court *had authority in law* to overrule the motion to dismiss the appeal.

1. *This question of the power of the Court to waive the rule is not a jurisdictional one.*

It will help to a clear understanding of the question to ascertain what is a jurisdictional matter, in the sense that a compliance with it cannot be waived by the Court, and what, on the other hand, is a matter addressed to the *discretion* of the Court. Manifestly a right of appeal given by statute upon conditions fixed by it, (as in the case of statutes requiring notice of appeal to be given during the term at which the case was decided), could be secured only by compliance with those conditions; and in that case the Court could not waive a compliance with them without invading the rights of the law-making power.

On the other hand, if the right of appeal were given, and the time and manner of the appeal were left to be regulated by the Court, the Court would thereby be clothed with authority to provide by rule, or otherwise, in regard to the same, and itwould make no difference whether the Court established a general rule, or provided by special order in each case in reference to the time and manner of the appeal. The Court, making rules, necessarily has the right to *abolish* them, aud, therefore, has the right to *waive* them, where the purposes of justice require it; for the greater includes the less.

It is, therefore, demonstrated beyond all question, that when the time and manner of the appeal are left to be fixed by the Court, no rule of Court in reference thereto can become a jurisdictional matter, in the sense that it cannot be waived by the Court.

The counsel for the Winslows claims that when the statute leaves the time to be fixed by the Court, the rule of Court becomes fixed and unalterable by the Court, as much so as a provision of the statute. Clearly this cannot be so, for, as

already stated, if the Court have authority to fix the time and manner of appeal, they are at liberty to do so by general rule or by special order, and have power to abolish or change their rules, or waive them, and there is no provision of statute or rule of law that interferes in the slightest degree with their doing so at their discretion.

It is by no means clear that the 23rd rule relied upon by the Winslows, has any application to a case where, as in the case at bar, the appeal was claimed and *allowed* in open Court at the time of the decree and entered in the decree upon the journal of the Court, and bail given within the time named by the Court; for by thus *allowing* the appeal, has not the Court thereby exercised its unquestioned power to allow an appeal in a manner different from that contemplated by the rule? The appeal thus allowed, as will hereafter appear, takes up the *whole case* for a new and entire trial upon its merits in the Circuit Court, and there certainly is no sense or law in requiring a writing to be filed in the District Court for the purpose of claiming or making an appeal, after it has already been claimed and allowed; nor does the law allow the District Court to determine what the legal effect of an appeal shall be, or what questions shall be heard in the Circuit Court. These things appear to us self evident, and it appears just as clear to us that the counsel for the Winslows have simply *begged every material question* in the case on this subject. They *assume* that the statute, in providing that the appeal may be taken to the next term of the Circuit Court, does not fix any *time* within which the appeal may be taken; and that the question of waiving the rule is a jurisdictional question in the sense that it cannot be waived; and furthermore that the allowing of the appeal at the time it was entered, giving bail within the time named, and filing a transcript of the record at the next term of the Circuit Court, did not constitute an appeal. And having *assumed* these things,

the counsel simply wonders how any one can resist the conclusions which he draws, based upon these easy assumptions. The trouble is that all of the assumptions are without support in reason or law, as will further appear in the course of this brief.

2. *The right of appeal is given, and the time within which it may be perfected is prescribed by the statute, and can neither be abridged or enlarged by the District Court.*

The Court is compelled to allow the appeal "to the next term" of the Circuit Court; and the Circuit Court is required to receive, hear and determine the appeal, (§631). The statute also provides (§632) what shall be done to perfect the appeal after its allowance—requiring simply copies of the proofs and such entries and papers on file as may be necessary to the hearing on appeal, to be certified to the Circuit Court. In the case of *Bank of U. S. vs. Swan*, 3 *Peters*, 68, the appellant was required by the practice of the Court to file the transcript *at the next term* of the Supreme Court, and it was held that this gave him the *whole term* within which to file the transcript. This same ruling was made in

Steamer Virginia vs. West, 19 *How.* 182;
Mesa vs. United States, 2 *Black*, 721-2;
Edmondson vs. Bloomshire, 7 *Wallace*, 306.

In all these cases the language *at the next term* or *to the next term*, was used interchangeably and was held to mean *within or during the next term.*

All these cases arose under the 63rd rule of the Supreme Court, under which the practice of the Court, from the time of Chief Justice Marshall to the present time, has been to allow the case to be docketed at any time during the term on motion to reinstate, and would not grant a certificate of dismissal until the end of the term for that reason.

The rules of the Supreme Court prescribed for the District Court require in cases of appeal, that the appeal shall be *demanded* while the Court is sitting, or within a certain time, (Rule 45) and that upon the appeal the prayer or demand for appeal and the action of the Court thereon shall be stated in the transcript (Rule 53) and requires nothing more than this in respect to the *sufficiency of the appeal.* Certainly it cannot for a moment be claimed that this rule authorizes the District Court to exact conditions for an appeal which the statute does not itself impose. Rule 45 was simply intended to authorize the District Court to fix a time *beyond the term* within which the party might *demand his appeal,* and had no other object. The 23rd rule of the District Court, if it was founded upon the authority of this 45th rule of the Supreme Court, clearly exceeded its authority in the attempt to impose the filing of the so-called written appeal after the appeal had been claimed and allowed in open Court in the decreee.

In the case at bar the appeal was claimed in open Court at the time of entering the decree, and its allowance and the time in which bond should be given provided for in the decree, (Record p, 180) and the bond was g ven, and all the papers required to be certified filed in the Circuit Court *at its next term,* and the case was set down for trial at that term, showing a full compliance by the appellant, Wilcox, with everything required by the statute to perfect his appeal.

And furthermore, we think that what was done may fairly be considered a substantial compliance with the rule of the Court, if it were binding, which we do not concede. For manifestly on the face of the rule it would require the so-called appeal to be sent up to the Circuit Court, since the trial in that court is by the rule limited to the specifications in this so called appeal. And if this were so, the filing of the paper with the person who was the clerk of both Courts, and its being filed by him in the Circuit Court, would accomplish all that could have been accomplished by his filing it in the

District Court and then transmitting it to the Circuit Court. And there is not the slightest pretence by the Winslows that they were in any respect misled by the manner in which it was filed.

This 23rd rule of the District Court required the appeal to be perfected within twenty days after the entering of the decree; whereas the statute gave the right to perfect the appeal at any time during the next term of the Circuit Court. Thus the time limited by the rule expired January 15th, 1878, while the time given by the statute extended to April 1st, 1878; and it is clearly manifest that the District Court had no right or power to prescribe such a limit, or in any manner to deprive Wilcox of the full right of appeal secured to him by the statute. The authorities fully sustain this view of the law. *United States vs. Curry*, 6 *Howard*, 106, 112. In that case the District Court of Louisiana had assumed the right by rules of Court to extend the time for appeal beyond the next term of the Circuit Court, and the question was raised whether the District Court had any such authority; this Court decided that it had not, and say: "The District Court appears "to have acted in relation to the appeal, under the erroneous "impression that it must follow the practice of the Louisiana "State Court, without adverting to the acts of Congress "which conferred on the Court the special jurisdiction it was "exercising and which prescribe the manner in which it shall "be exercised. *There was no necessity for the petition to the "District Judge to grant the appeal.* It was a matter of "*right given by law* after final decree, which *the court could "not refuse. Nor had it any power to prescribe the time or "manner in which the record was to be transmitted,* and the "case brought before this Court. *That, too, is regulated by "acts of Congress which the Court can neither change or mod-"ify.* All the orders, therefore, upon this subject were un-"authorized and void, and *the validity of the appeal depends "altogether upon the laws of the United States, without ref-*

"*erence to* the laws of Louisiana or *the orders* of the District "Court.

38 *Maryland,* 468.

26 *Michigan,* 283.

20 *Howard,* 260 263.

18 *Howard,* 530, 531.

In this last case the record was as follows: "And from the "foregoing decree the defendants prayed an appeal which "was granted them on giving bond and security to be ap- "proved by the Court, and which bond was given accord- "ingly." It was held that the record showed *all that was necessary to sustain the appeal;* and the Court say (p 538): "The appellant *had the right to carry up his appeal and no "order of Court could deprive him of this right.*" The same doctrine is laid down in *Otis vs. The Rio Grande,* 1 *Woods C. C. Rep.* 593-6; where the Court say (p 596): "The law reg- "ulating appeals in cases of Admiralty from District to Cir- "cuit Courts, uses precisely the same language as the law reg- "ulating appeals from the Circuit to the Supreme Court of "the United States. These provisions of the law are in the "same section of the same statute, namely, Sec. 2 of the act "of March 3rd, 1803, (2 Stat. 244). The language in both "cases is '*an appeal shall be allowed.*' In both cases the ap- "peal is allowed as a matter of course. *There is no discretion* "lodged with the Court. It is the *law* and not the *Court* "that *allows* the appeal."

Steamboat New England, 3 *Sumner,* 495 is to the same effect, and the Court say that if the Distict Court should refuse to allow an appeal upon the proper requisitions of the law being complied with, the Circuit Court would compel the District Court to allow the appeal.

This case and that of *Norton vs. Rich,* 3 *Mason,* 443, are cited by counsel for the Winslows as showing that the rule of the District Court has the effect of a statute. On the con-

trary they show no such thing, but simply show that where *no rule* of the District Court existed, the Court held, as a matter of practice on general principles, that the appeal must be demanded at the term of Court at which the decree was rendered. By the expression "the appeal may be made" *viva voce*, the Court mean that it may be claimed or demanded; and both cases show this. And these cases simply show that the Court considered that an appeal could not be claimed or demanded after the term of the Court at which the decree was made, unless some rule of the Court authorized it; and the Court say that if such a rule existed it would be "considered as directory to all parties." This is very far from showing that if such a rule of Court existed it could not be waived or varied by the Court. None of the cases cited by opposing counsel from *Peters' Reports*, or 1 *Abb. Adm.* 422, bear on the question whether a rule of Court has the force of a statute and cannot be waived; while the case in 1 *Black*, 522, which relates only to the 12th rule in Admiralty, as the 8th clause of the syllabus shows, expressly holds that the rule has *not* the force of a statute, but is wholly within the control of the Court, and is not jurisdictional.

3. The rule is also void in so far as it prescribes the *effect* of an appeal, or as to how the case shall be conducted in the Circuit Court. This is clearly shown by the case of *The Lucille*, 19 *Wallace*, 73, 74. "An appeal in Admiralty has the "effect to supersede and vacate the decree from which it is "taken. A NEW TRIAL, COMPLETELY AND ENTIRELY NEW, "with other testimony, and other pleadings, if necessary, or "if asked for, is contemplated. A trial in which *the judg-"ment of the Court below is regarded as though it had never "been rendered.* A new decree is to be made in the Circuit "Court. This decree is to be enforced by the order of that "Court, and the record remains there. The case is not sent "back to the District Court for executing the decree, or for

"any other proceeding whatever, and that Court has noth-"ing further to do with it."

The Lottawana, 20 *Wallace*, 201.
The Collector, 6 *Wheaton*, 194.

4. *The rules of Court may be waived or controlled by the Court.* In the Case of *U. S. vs. Breitling*, 20 *Howard*, 252, Judge Taney held: "It is in the power of a Court to suspend "its own rules, or to except a particular case from them to "subserve the purposes of justice." This doctrine is sustained by the following authorities:

1 *Wheaton*, 305, 361, 362.
1 *Black*, 522.
10 *Peters*, 24.
23 *Howard*, 1.
14 *Blatchford, C. C.*, 34.
3 *Woodbury & Minot*, 157, 359, 361.
94 *U. S.* (4 *Otto*), 112.

In 5 *Wallace*, 822, which was a case of appeal from the Circuit Court for the Northern District of Illinois, the bond was not filed within the time required by the rule of the Circuit Court, and a motion was filed to dismiss the appeal for that reason. It was held: "When, through mistake or acci-"dent, no bond, or a defective bond, has been filed, this "Court will not dismiss the appeal, if it is in all other re-"spects quite regular, except on failure to comply with an "order to give the proper security within such reasonable "time as it may prescribe." Here the Supreme Court waived compliance with the rule of the Circuit Court as to giving bond; and clearly, if that may be done, the Circuit Court may waive compliance with the rule of the District Court, as to filing the paper referred to in rule 23, upon such conditions as are deemed just. In addition to this it is shown by the case in 5th *Wallace* that the District Court cannot make

rules which the Circuit Court may not waive, or from the operation of which it may not except particular cases, for the purposes of justice.

The claim of counsel for the Winslows, that the District Court has an *exclusive* authority, beyond the allowance of the appeal and the taking of bail, to provide for the various matters contained in the 23d rule, is not supported by the reference made to the last clause of the decision in *Norton vs. Rich*, 3 *Mason*, 443.

It will be seen by reference to that case that no appeal was claimed in or allowed by the District Court, and it is manifest that the claiming and allowance of the appeal was a matter which the statute has made it the duty of the District Court to act upon. And all that is said in that case in reference to the exclusive jurisidiction of the District Court refers solely to its jurisdiction to *allow the appeal*, and it is manifest, as already shown, that should the District Court improperly refuse to allow the appeal the Circuit Court would compel the allowance.

All that the District Court might attempt to do beyond the allowance of the appeal, in the way of mere rules of practice, would depend upon the general power of the Court to make rules for its own practice, and not upon the exercise of any statutory right or power. No question arose in that case as to the validity of any rules of the District Court. It is clear, therefore, that in the mere matter of rules of practice, the Circuit Court cannot be bound in the exercise of its discretion, by the orders or rules of the District Court; for this would be an assumption of power over the rules of practice of the Circuit Court, not conferred by any statute, and inconsistent with the general power of every Court to regulate its own modes of practice.

These remarks apply equally to the case in 3 *Sumner*, 495. That case merely decides that the term of Court at which the

appeal shall be taken may be prescribed by the District Court, but is not an authority as to the validity of any rules assuming to regulate anything *after* the allowance of the appeal.

The case of *Grigsby vs. Purcell*, 99 *U. S.* 505, cited by counsel for the Winslows, supports our claim as to the law rather than theirs; for that case expressly recognises the well established doctrine *that the Court has the power in its discretion to waive its rules, or except cases from their operation for good cause shown.* The statute, §997 of the Revised Statutes, expressly gives the Supreme Court authority to fix the time within which the appeal shall be perfected, and under this statute the Court has by rule uniformly required the appeal to be perfected within the first six days of the next term. Now the claim made by the appellants is that in such a case the rule of Court cannot be waived; but the very case cited by them establishes the doctrine that *it can, and will be, for good cause shown.* In that case the party had done nothing towards perfecting his appeal for more than a year after the next term, and the Court simply decided that *no good cause was shown* for a waiver of the rule or for excepting the case from it.

In the case of *United States vs. Pacheco*, 20 *Howard*, 261, an appeal had been taken, but the transcript had not been filed in the Supreme Court within the first six days of its next term, and a motion to docket and dismiss the appeal under the 63rd rule was made. The Court say (p 263): "No transcript has yet been filed by the appellant; the ap- "pellee is therefore entitled to have the case docketed and "dismissed under the rule. * * * Indeed it sometimes "happens under this rule that the Court permits the tran- "script of the record to be filed by the appellant and the case "docketed for argument *at the same term* at which it had "previously been docketed and dismissed on the motion of "the appellee. * * * It follows from what has been said "that although the case before us must be docketed and dis-

"missed, yet this will not prevent the United States from "filing a transcript at the present term and docketing the "case for argument, if they can show that the delay has not "arisen from any fault or negligence on their part."

No more explicit assertion of the power of the Court to waive or disregard its own rules could be made, and certainly the 23rd rule of the District Court requiring a written appeal to be filed within a fixed period, was no more jurisdictional than the 63rd rule of the Supreme Court requiring a transcript to be filed within a fixed period, and this rule the Court unqualifiedly asserts its power to disregard or waive for the purpose of justice.

The question of waiving the rule, or excepting the case from its operation, even if the rule were valid, was necessarily addressed *to the discretion of the Court;* for in its very nature it was only the exercise of a *discretionary power* and not the application or enforcement of any fixed law statutory or otherwise.

If the Circuit Court had the *power* to sustain or dismiss the appeal, the decision of the motion was necessarily addressed to the *discretion of the Court*; and the rule of law is equally well settled that *a matter of discretion in the Court below cannot be the subject of an assignment of error.*

Murphy vs. Stewart, 2 *Howard,* 263.
Morsell vs. Hall, 13 *How.,* 212.
Turner vs. Yates, 16 *How.,* 14.
Slicer vs. Bank of Pittsburgh, 16 *How.,* 571.
Early vs. Rogers, 16 *How.,* 599.
Spencer vs. Lapsley, 20 *How.,* 264, 267.
Williams vs. Gibbs, Idem, 535.
Cheang Kee vs. The United States, 3 *Wallace* 320.
7 *Cranch,* 152, 155.

5. *The rule is not valid,* as already shown; for, while in the case of appeals or error to the Supreme Court, the statute expressly authorizes the Court to fix the time of perfecting them, the statute as to appeals to the Circuit Court expressly gives the whole of the next term within which to perfect them, as already shown; and the counsel for the Winslows have failed to cite authorities to the contrary.

The decisions of this Court, as well as of the Circuit Court, which we have cited, are *conclusive* that the Court cannot abridge or enlarge the time and terms of appeal fixed by the statute; and that the claiming and allowance of the appeal at the time of the decree, giving the bail, and filing of the transcript at the next term of the Circuit Court, is all that is required to perfect the appeal, and this being done, it is the *law* and not the *Court* that gives the appeal. The District Court had no authority to deny or restrict this right of appeal, and the requiring of the writing, called an appeal, to be filed in that Court after the allowance and entering of it, and the giving of bail was alike without sense or warrant of law.

The correctness of the decision of the Circuit Court in sustaining the appeal is therefore *conclusively established* by the statute and the decisions of the Supreme Court, as well as by the other authorities cited. The ground upon which the Circuit Court overruled the motion, although correct, is of no consequence, since the law fully sustains its decision, without reference to the reason given for it.

The claim of Wilcox, owner of the Osborne, that there is error in the rule of damages adopted by the Circuit Court.

The question arises on the record, in the report of the Master (p. 221, 222, 223, 224), whether the value of the use of the vessel at the rates named in the charter made the previous year, was the correct rule of damages. This was the rule adopted by the Master, in opposition to the claim made by

Wilcox that the value of the use of the vessel at the then current rates of freight, was the legal rule of damages. The exceptions of Wilcox to the Master's report were upon this ground, as appears by the statement of the case already made (p. 225), and was overruled by the Circuit Court, and the Report was confirmed and the final decree entered accordingly. And from this decree both parties appealed (p. 263, 264.)

We claim that the rule of damages adopted by the Circuit Court was clearly erroneous.

A formal objection is interposed by the Winslows against the consideration of this question, because a formal exception was not made to the final decree in addition to the exception to the Master's report. There is no foundation for this objection, for the rule is well established by repeated decisions of this Court, that the whole record is subject to review, and that all questions of law arising upon it will be considered and determined by the Court whether arising by exception or otherwise, and that *no exception is necessary when the error appears on the face of the record.*

Murray vs. The Charming Betsy, 2 *Cranch* 64, *c.* 124.
Himely vs. Rose, 5 *Cranch*, 313.

In this case Marshall, Ch. J. says (p. 316), "No exceptions "having been taken to the report it is now liable to those excep- "tions only which appear on its face * * in those items of "the claim which are disallowed; the error, if it be one, is ap- "parent on the face of the proceedings and may therefore be "corrected."

20 *Howard*, 427, 433.
11 *How.* 669.
4 *How.* 131.
6 *Cranch*, 221.
6 *Wheaton*, 410.
11 *Wheaton*, 171.
19 *Howard*, 393.

The law of 1875 has not changed the rule in any respect except that findings of fact will not be reviewed. In all other respects the whole case is to be retried on appeal, upon the finding of fact and on whatever errors are apparent on the face of the record, however they appear. No exception is necessary where the error otherwise appears on the face of the record; and the counsel for the Winslows is entirely mistaken when he *assumes* again in his brief that an exception to the final decree was necessary. The report shows on its face the rule adopted by the Master in estimating the damages, and the exception to it filed in Court; and that was all the exception necessary to bring the record on that subject before this Court for review upon the appeal, as the authorities cited show.

Passing to the consideration of the question as to the true rule of damages in such cases, we claim and insist that the rule adopted by the Circuit Court was entirely erroneous.

We are aware that there has been considerable looseness in the decisions on this subject in some of the District and Circuit Courts, but so far as the decisions of the Supreme Court are concerned we think they will be found in accordance with the rule as claimed by us, that the current rate of freight should govern in ascertaining the damages; and that in all the cases where charters or contracts for the hiring of vessels are allowed to be shown, it is simply *for the purpose of ascertaining what the current rates of freight were;* and that in such cases the charters shown were made about the time of the injury, and would therefore tend in some measure to show what the going rates of freight were. We do not question the correctness of the decisions allowing charters, made about the time of the injury, to be shown for the purpose above stated; but we are unable to find any authority where a charter made *nearly a year* before the injury, and *not tending in any degree to show the current rates at the time of the injury,* has been

allowed to be introduced in evidence on that question; much less to control in estimating the damages, when the rates are shown to be twice as much as the rates named in the charter.

It seems clear to us that the charter, under such circumstances, cannot control in fixing the damages for many reasons:

1st. That the value of the use of the vessel at the going rates of freight *is lost to somebody;* and the charter is merely a *collateral matter, not affecting the actual loss.*

2d. That it is not a matter with which the wrongdoer who causes a collision, has anything to do, whether the *owner* or the *charterer* of the injured vessel would lose by it.

3rd. That the owner of the injured vessel would be liable under his charter for his failure to carry cargoes according to its provisions, and he would not be excused by the collision, and could therefore only be made good by allowing him the going rates, since it is by them that his liability to his charterers would be measured.

4th. That if the charter should happen to be *higher* than the going rates, the owner could not insist on it as the rule of damages; otherwise the party liable for a collision would be made to pay roundly for the incapacity or bad judgment of a third party in making an injudicious charter, and in excess of the actual damage caused.

We are aware that there is a class of cases where one contract is made with express reference to another contract, and for the purpose of enabling the party to fulfil the latter, in which the collateral contract may be referred to in ascertaining the damages, on the ground that such contract and such damages, in the case of a breach of it, were *in the contemplation of the parties* to the contract sued on; but clearly the law

applicable to such cases is not applicable in any sense to the case of a collision; for there is no possible ground for claiming that charters made a year before had any reference to the collision, or that the parties to a collision had any reference to charters or any other contract. The only damage which can consistently be held to be in the contemplation of the parties to a collision, or for which they ought to be held liable, is such damage as will inevitably and directly arise from the actual collision, *in all cases*, and irrespective of any *collateral contingency*, such as the existence or non-existence of a charter, or the providence or improvidence of its provisions. The damage which will uniformly arise from injury to a vessel is the loss of her use at the current rates of freight, and this rule can be readly applied in all cases without resort to remote inquiries into the intricacies of collateral matters.

The case of *Williamson vs. Barrett*, 13 *Howard*, 101 to 115, is relied on by the libellants in this cause to support the rule of damages adopted by the master; but a careful inspection of that case will show that it does not support it, but instead maintains the very rule that we contend for, viz.: that the fair ordinary value, or "market value" as commonly expressed, is the measure of damages, and is the value of the use of the vessel; and that case and all the cases to be found on the subject adopt the rule. The cases in which the charter of a vessel has been looked to, to ascertain the market value of her use all show that the charter is looked to as being *an indication of what is the market value*, and for the reason that such charters were made as vessel charters usually are, at or about the time of the injury. And that a vessel's charter, being merely a collateral contract, cannot in any other way than as evidence of market value of her use, be inquired into, is clear from the following authorities.

Masterton vs. City of Brooklyn, 7 Hill (N. Y.), 61. In that case the plaintiff had contracted to furnish marble for a city hall to the defendant at a fixed price. He then contracted with Kain & Morgan to buy the marble of them at a much less price. The city refused to perform the contract and receive the marble. The plaintiff sued for damages and claimed to recover the difference between what the marble was to cost them and what the city was to pay, and sought to prove the terms of his contract with Kain & Morgan for that purpose. The Court ruled out this contract as evidence, and say, pp. 68 and 69: "So, a good "bargain made by a vendor in anticipation of the price of "the article sold, or an advantageous contract of re-sale made "by a vendee, confiding in the vendor's promise to deliver "the article, are considerations always excluded as too remote "and contingent to affect the measure of damages;" and on p. 72, "It will be seen that we have laid out of view the "sub-contract with Kain & Morgan * * preparatory and "subsidiary to the performance of the principal one with the "defendants. Indeed, I am unable to comprehend how these "can be taken into account or become the subject of consid-"eration at all in settling the amount of damages to be recov-"ered for a breach of the principal contract. The defendants "had no control over, or participation in, the making of the "sub-contracts, and are plainly not to be compelled to assume "them, if improvidently entered into. On the other hand, "if they were made so as to secure great advantages to the "plaintiffs, surely the defendants are not entitled to the gains "which might be realized from them. In any aspect, there-"fore, these sub-contracts present a most unfit, as well as "unsatisfactory, basis on which to estimate the real damages "and loss occasioned by the default of the defendants."

The same principle is recognized in *Clare vs. Maynard*, 6 *Ad. & Ellis* 510. The syllabus is: "In an action for breach "of warranty of a horse, the plaintiff cannot recover as spe-"cial damages the loss of a bargain for re-sale of the horse,

"though the contract for re-sale at a profit had been made "before the unsoundness was discovered."

In *Walker vs. Moore,* 10 *Barn. & Cressw.* 416, the plaintiff claimed damage for loss of a re-sale at a profit of land bought of the defendants. It was held by the Court that this was not a proper rule of damages.

In *Fox vs. Harding,* 7 *Cushing,* 516, the plaintiffs had contracted with the defendants to furnish them certain machinery to be delivered at a stated time to equip their machine shops, and relying upon the performance by the defendants of this contract had contracted with other parties to furnish certain articles of machinery. The defendants did not fulfill their contract in time, and the plaintiffs claimed to recover of them damages caused by their own inability, in consequence of the defendant's delay, to perform the contracts which they (plaintiffs) had so made. The Court held that these contracts could not be considered in fixing the damages.

In all these cases the parties sought to avail themselves of the *advantages* which they had obtained by having made contracts favorable to themselves, and to recover from the defendants the loss of those advantages in consequence of the wrongs or defaults of the defendants; and in every case it was held that they could not do so.

It is perfectly manifest that if the contracts had been to the *disadvantage* of the party suing and the defendants had sought to avail themselves of this to reduce their own liability they could not have been allowed to do so for the reasons stated in the cases cited.

The Record shows that the charters in this case were not a renting out of the vessels, but agreements by the owners for carrying ore by them at the price named; and it is therefore entirely clear that the parties for whom the ore was to be car-

ried, were not in possession of the vessels, nor had any right of possession, and that the party for whom Wilcox was to carry ore could have no claim against any one but him, and that too, only under the contract.

The cause of action was the wrongful injury to his vessel, and the loss of the use of it was merely *a part of the damage sustained;* and there could not be any cause of action against the Winslows or their vessel in favor of the party for whom Wilcox was carrying ore, for the reason that the Winslows were strangers to the contract. The *ownership* and *possession* of the Osborne were in Wilcox, and there was therefore but *one cause of action* for the injury to it.

The collision did not excuse Wilcox from the substantial performance of the contract, and he was therefore liable under it for the damages sustained by the parties for whom he was to carry the ore. This is shown by the following authorities: In 2 *Parsons on Contracts, Fifth Edition,* pp. 672-3, it is laid down on this subject that only what is termed the act of God will excuse the performance of a contract. Anything that a party can protect himself against by stipulation will not excuse him. "But to make the act of God a defense, it "must amount to an impossibility of performance by the prom- "isor; mere hardship or difficulty will not suffice."—"So "the non-performance of a contract is not excused by an act of "God if it may still be substantially carried into effect, al- "though the act of God makes a literal performance of it "impossible."—"So if it becomes impossible by contingen- "cies which should have been foreseen and provided against "in the contract, the promisor should still be held responsi- "ble," (p. 673.)

In *Atkinson vs. Ritchie,* 10 *East.* 530, the master and freighter of a vessel of 400 tons having mutually agreed in writing that the ship should proceed to St. Petersburgh and

there load a full cargo for London, and the master, when the vessel was half loaded, sailed away upon a rumor of a hostile embargo, it was held that the vessel was liable for not taking a full cargo, although the jury found that the master acted in good faith under a reasonable and well grounded apprehension at the time, and a hostile embargo and seizure was in fact laid on six weeks latter. In the note *h* to the above citation from *Parsons on Contracts*, p. 672, it is said on p. 673 near the end of the note: "And this difference was taken, that when the "*law* creates a duty or charge and the party is disabled to per- "form it without any fault in him, *and hath no remedy over*, "there the law will excuse him. But where the party *by his* "*own contract creates* a duty or charge upon himself, he is "bound to make it good, notwithstanding any *accident by* "*inevitable necessity*, because he might have provided against "it by his contract."

These authorities show that the owner of the Osborne, though he could not *literally* comply with his contract after the collision, was bound to a substantial compliance and performance of it by furnishing another vessel to carry the ore, or by paying as damages the difference between the charter rates and what it would cost the charterer to get the ore carried by other vessels at the going rates. And in thus losing the earnings of his vessel at the charter rates and being obliged to pay *in addition to this loss* the difference between the charter rates and the current rates in order to comply with his contract, it was clear that Wilcox was losing during the time his vessel was detained in consequence of the collision, *exactly the value of her use at the current rates of freight*, neither more nor less; and *in all cases* of detention of a vessel this would be the actual loss to the owner, for if his charter rates should happen to be *higher* than the current rates, he would still be losing only the current rates, since by hiring another vessel at the current rates he could comply with his contract and realize all its advantages.

The holding, therefore, of the master, adopted by the Circuit Court, that "the full earnings which the claimant could "have made *under the charter* had the collision not oc- "curred," "is a full indemnity for the loss sustained," is manifestly erroneous, for it furnishes him no indemnity against his liability to furnish another vessel to carry out the charter or make good the difference to the charterers.

The market value of the use of the vessel is the rule established by this Court in *Williamson vs. Barrett*, as a careful examination of that case will show. The injured boat was carrying a cargo at the time and no question was made but the freights she was earning were the going rates; and there was no claim of any charter. The Court say, (p 112): "There was no question made in respect to the freights of "the vessel, and hence the *general principle stated* was appli- "cable, irrespective of this element, as influencing the "result."

What then is the "general principle stated" as the rule of damages? It is found on p 110: "The general rule in "regulating damages in cases of collision is to allow the in- "jured party *an indemnity to the extent of the loss sustained;*" and it includes an indemnity for the loss of the use of the vessel, (p. 110, 111.)

On p. 111, after adverting to the uncertainty which sometimes exists as to whether there is a reliable demand and market value for the use of vessels, the Court say: "If, how- "ever, we look to the demand in market for vessels of the "description that has been disabled, and to the price there "which the owner could obtain or might have obtained for "her hire as the measure of compensation, all this uncertainty "disappears. If there is no demand for the employment, "and, of course, no hire to be obtained, no compensation for "the detention during the repairs will be allowed, as no loss

"would be sustained. But if it can be shown that the vessel "might have been chartered during the period of repairs, it "is impossible to deny that the owner has lost, in conse- "quence of the damage the amount which she might thus "have earned:" and the Court say, p. 112, that the market price or value of a vessel's use "can be ascertained as readily, "and with as much precision as the price of any given com- "modity in the market, and affords as clear a rule for esti- "mating the damages sustained on account of the loss of her "service, as exist in the case of damage to any other de- "scription of personal property of which the party has been "deprived."

Probably few of the decisions of this Court have been more frequently cited than this case of *Williamson vs. Barrett*, and the construction given to it by other Courts has been such as we claim for it.

In *The Cayuga*, 2 *Benedict D. C. Rep.* 125, the case is so construed and the Court there hold that where there is *no market value* for the use of a particular class of vessel, (ferry-boat in that case,) the judgment of persons conversant with the business in which she was engaged wh n injured, as to the value of her use, affords the best means of ascertaining it.

In *The Schooner Transit*, 4 *Benedict D. C. Rep.* 138, decided in 1870, the Court say (p. 141.) "The question is what "their (libellant's) pilot boat was worth for her time. In the "absence of a market for the chartering of pilot boats the "only other resort proper to be had is to the judgment of "persons acquainted with the piloting business as to the "value of the time of the vessel, based upon the employment "she was in, its character and constancy, and its then *recent* "*results* in the way of earnings."

The Court in *Williamson vs. Barrett* refer in one place to a charter as proper evidence of the value of the use of a vessel; but manifestly this could only be so when the charter is made *at or about the time of the injury.* Vessel charters are generally so made, and usually for only a single voyage, especially on the seaboard. Charters made in one year for the entire season of the next year are very unusual in general commerce, and we have not been able to find a case where a charter made so long before the injury has been allowed in evidence to show the value of a vessel's use, at a time when the market value of her use had entirely changed. No such question arose in the case of *Williamson vs. Barrett,* and the Court in referring to a charter were merely speaking of the different kinds of evidence which would tend to establish the market value of the use of the vessel at the time of the injury, and the case is no authority therefore for making the charter the rule of damages. The controlling principle of the case is that there must be "an indemnity *to the extent* of the loss," and this can be given only by allowing the value of the use of the vessel at the going rates. Anything less than this leaves Wilcox without indemnity for his liability to supply another vessel, or make good the difference to complete his contract.

It was not necessary to introduce evidence to show whether Wilcox employed another vessel, or what difference he paid, as all these things were matters purely between Wilcox and the other parties to his contract, and with which the Winslows had nothing to do. The only question is whether the charter can be made the rule of damages, and Wilcox thus deprived of full indemnity.

We submit, as the result of the authorities presented, that the actual value of the use of the vessel at the current rates is the established rule of damages for her detention, and that the damages can neither be increased or diminished by any collateral contract. And that when the charter was made

nearly a year before the injury and confessedly one-half less than the going rates of freight and the value of the use of the vessel, it is not admissible even as evidence on that subject, much less does it constitute the rule of damages.

The Circuit Court therefore clearly erred in overruling the exceptions to the Master's report in this respect. And as the report shows the increased amount that should be allowed to Wilcox on the basis of the market value of the use of the vessel, we insist that this should be allowed to him and the decree changed accordingly.

L. PRENTISS,
Proctor for Claimant.

JACOB D. COX,
Counsel.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~343.~~ 97

THE BRIG ANNIE LINDSLEY, HER TACKLE, ETC., CORNELIUS T. TOMPKINS, CLAIMANT, APPELLANT,

vs.

DANIEL BROWN, RICHARD BARDEN, WALTER PAINE, PHILIP D. BARDEN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 343.

THE BRIG ANNIE LINDSLEY, HER TACKLE, ETC., CORNELIUS T. TOMPKINS, CLAIMANT, APPELLANT,

vs.

DANIEL BROWN, RICHARD BARDEN, WALTER PAINE, PHILIP D. BARDEN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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mist or fog. That while so proceeding the sails of vessel were made ahead or nearly so, but no light was discernable from said vessel. That after discovering the said vessel, which was apparently bound in an opposite direction to that of the schooner, and when it was apparent there would, unless something was done, *there would* be a collision, the wheel of the schooner was ported and the said schooner opened the other vessel until the red light of the approaching vessel was seen off the port bow of the said schooner. That the wheel of the said schooner was kept port, and the approaching vessel which turned out to be the brig Annie Lindsley was hailed from the schooner to luff, but instead of porting she was kept away and came on and against the said schooner Sallie Smith, the stem of the Annie Lindsley striking the said schooner on her port quarter, crushing in her side and causing her to sink within a few minutes with her cargo and everything on board.

Fourth. That the wind at the time was free for vessels upon their proper courses bound to the east, but those west were close hauled.

Fifth. That said collision was caused solely by default and negligence of those navigating the said brig Annie Lindsley, and among other things in not keeping a lookout, in not having the proper lights set and burning, in not having a proper and careful lookout, in not porting and keeping to the right when meeting a vessel ahead and bound in an opposite direction, and in starboarding instead of porting and thus causing the collision. That the navigation of the said schooner was without fault; that she had the proper lights set and burning brightly, and which were seen at sufficient distance by those on board the brig to have avoided the said schooner. She had a careful and competent
4 lookout; that her wheel was ported when the brig was discovered as the act of Congress as well as the rule of the sea required.

Sixth. That by the collision and sinking aforesaid, the said schooner with her cargo and everything on board became a total loss. That the said schooner was at the time of the value of 5,000 dollars, and the cargo on board of 2,000 dollars, and the freight for the same would have amounted to the sum of 500—making in all the sum of 7,500 dollars, and that the libellants claim to recover in this action of the value of the schooner and freight as their property, and for the value of the cargo as carriers thereof.

Seventh. That payment has been demanded from the owners of the said brig for the damages aforesaid, and payment refused.

Eighth. That all and singular the premises are true and within the jurisdiction of this honorable court.

Wherefore, the libellants pray that process in due form of law may issue against the said brig Annie Lindsley, her tackle, apparel and furniture, and that all persons having, or pretending to have, any interest therein may be cited to appear and answer all and singular the matters so propounded, and that this honorable court would be pleased to pronounce for the damages aforesaid, and for such other and different relief in the premises as shall to law and justice appertain, and also to condemn the said brig and the party intervening for his interest therein in costs.

BEEBE, DONOHUE & COOK,
Proctors.

BEEBE, *Advocate.*

5 *Amended answer.—Filed December* 24, 1872.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The claim and answer of Cornelius T. Tompkins, owner of the brig Annie Lindsley, intervening for his interest in the said brig, her tackle, apparel and furniture, and against all persons intervening therein, shows:

First. That the said Cornelius T. Tompkins claims the said brig, her tackle, apparel, furniture and the cargo.

Second. This claimant, on information and belief, denies that the schooner Sallie Smith was owned by the libellants, and under the command of Mark P. Chase, as master, and was tight and staunch and well and sufficiently manned, tackled and provided, in every respect seaworthy, as alleged in said libel.

Third. This claimant admits that on the evening of the seventh day of May, one thousand eight hundred and sixty-nine, the said schooner Sallie Smith was bound on a voyage from Portland via the Connecticut River to the city of New York, but this claimant neither admits nor denies that she was laden with brown stone, but leaves the same to be duly proved to the satisfaction of this court. This claimant admits that the said collision between the brig and schooner occurred at about half-past eight o'clock, and off Eaton's Neck light-house; that said light-house bore about south southwest, and about three miles distant. This claimant denies that at the time of the collision the wind was blowing about south half west, with a good whole sail breeze, but alleges that it was blowing about southeast; and he denies that the schooner had her regulation lights set and burning brightly, and he denies that the man at the wheel, and the man on the lookout, were competent men,
6 and were carefully attending to their duty; and he further denies that the said schooner was heading a little south of west or about west, but alleges that when she was first seen by the hands navigating the brig, she was steering a west by south course; that just before the collision occurred she suddenly changed her course to northwest, which brought her across the bow of the brig.

This defendant further states as to the other facts alleged and set forth in the third head or paragraph in said libel, he neither admits nor denies the same, but leaves the same to be duly proved to the satisfaction of this court.

Fourth. This claimant denies that the wind at the time was free for vessels upon their proper courses bound to the east, those going west were close-hauled, but alleges that the wind was free for vessels bound to the west, and that the brig at the time was sailing close-hauled.

Fifth. The claimant denies each and every allegation contained in the fifth head or paragraph of said libel, viz, that the said collision was caused solely by default and negligence of those navigating the brig Annie Lindsley, in not having the proper lights set and burning; in not having a proper and careful lookout; in not porting and keeping to the right when meeting the vessel ahead and bound in an opposite direction, and in starboarding instead of porting, and thus causing the collision; and he further denies that the navigation of the schooner was without fault; that she had the proper lights set and burning brightly, and which were seen at a sufficient distance by those on board the brig to have avoided the said schooner, and that she had a careful and competent lookout, and that her wheel was ported when the brig was discovered. This claimant alleges that the said collision was caused solely by

the default and negligence of those navigating the said schooner Sallie Smith, and, among other things, in not having proper lights set and burning, and in not having a careful and proper lookout, and in not having a sufficient force for the navigation of the schooner.

7 That the navigation of the brig was without fault; that the brig was sailing close-hauled and had her starboard tack aboard; that the schooner was approaching in an opposite direction, and her green light was first seen on the lee bow of the brig. As the schooner approached she was going to the windward of the brig, and she hailed the brig to keep off, and the wheel of the brig was turned to keep her off, and then the schooner suddenly changed her course to the northwest, and she again called out to the brig to luff, that the wheel of the brig was immediately put hard-down, and did luff, but it was too late, for the schooner kept off across the bow of the brig and winged her foresail out, and the brig struck the schooner on the port quarter and she sunk in about three minutes without any fault or negligence of the brig whatever; that the wind at the time was free for vessels bound to New York, and was on the port side of the schooner, and on the starboard side of the brig.

Sixth. The claimant denies that the said schooner was, at the time, of the value of five thousand dollars, and he further denies that the cargo on board was of the value of two thousand dollars, and that the freight on board would have amounted to the sum of five hundred dollars, making in all the sum of seven thousand five hundred dollars. And the claimant further alleges that the libellants are not entitled to recover any sum whatever in this action.

That all and singular the premises are true.

Therefore, the claimant prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in cost, and otherwise law and justice to administer in the premises.

G. M. & A. W. SPEIR,
Proctors for Cl'm't.

GILBERT M. SPEIR,
Advocate.

8 U. S. district court. In admiralty.

DANIEL BROWN AND OTHERS }
agst.
THE BRIG ANNIE LINDSLEY. }

Before Hon. Judge Blatchford.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JANUARY 11TH, 1873.

For libellants, Beebe, Donohue & Cooke.
For claimants, G. M. & A. W. Speir.
Mr. Donohue read the libel; Mr. Speir the answer.
Mr. Donohue read the libellants' depositions; Mr. Speir claimants' depositions.

Libellants' deposition of WILLIAM H. READ, of Fall River, Mass.:

I follow the sea; have so from six or seven years, off and on. I was on the Sally Smith at the time of the collision with the Annie Lindsley; we were bound to New York from Portland quarries. The collision was

about a half an hour after eight o'clock. I was, at the time of the collision, on the lookout, forward of windlass; had been on the lookout on that duty since eight o'clock. The first I saw of the other vessel, was seeing a vessel; could not then say whether she was a brig or not. The wind was south by west, very near that; we were close-hauled; it bore about dead, and from the course of the vessel it appeared to be going in opposite directions. There was no light that I saw on the other vessel when first discovered. Our mate was at our wheel—Logan is his name. There was no one on that watch but myself and Logan. I reported the vessel ahead, and told him to swing her off. He did so until
9 I saw her larboard light, that was her red light. Up to this time I had seen no other light on her. When we came together she hit us on the port quarter, "windward." Our vessel sunk after the collision. I got on the brig. I saw the green light lighted; it was lighted by one of the men, who was told by one of her officers to do it. I saw him several times during the night take it down to light it. I did see him take down the green lamp after I got on board after the collision, and saw him light it. We hailed and hailed from our vessel. I told them to luff. After we got on the other vessel—I don't know what his name was—but I heard a man at the wheel say he did not see us, or know we were ahead; but he heard the hail, and had put his helm down, but the brig would not luff. He said there was only one man on deck, and he was aft to work on the house; they were short-handed.

Cross-examined:

I know the man was told to light the green lamp by hearing him told. I suppose it was an officer told him, but I did not know. The man who told the other came to the forecastle door. I could not tell what kind of a looking man. It was dark. This very shortly after we got on board. Can't tell how long or how many minutes. The man who lighted the green light I don't know the name of. I could not tell how he looked.

Q. When you said, I saw him light the green light several times, where was it you saw him do it?

A. Several times during the night.

Q. Do you know how many hands they had on the Lindsley?

A. Three men before the mast was all I saw. I don't know how many aft. When the man at the wheel said that the man on deck was at work in the house, I don't think what he meant, or anything about it.

Q. How were you headed at the collision?

A. I cannot tell the exact point of the compass we were going.

Q. Can you tell how the A. L. headed at the collision?

10 A. I cannot; she struck us on our windward quarter; our vessel went down in not over five minutes, I think, after the collision; I cannot recall anything our captain said when he went on the Lindsley; I heard no hail from the A. L.; I am twenty seven years old last September; I rather think I have been more than half the time at sea; about six or seven years going to sea; I suppose perhaps five minutes before the collision I saw the other vessel, made her out to be a vessel when I first saw her.

WILLIAM H. REED.

Sworn to before me this 7th day of June, 1871.

A. W. HALL,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Libellants' deposition of MARK P. CHASE, of Fall River:

Am 28 years old last March: been to sea 12 years, going back to Fall River; I was master of the Sally Smith at time of collision, bound from Portland, Conn., to New York with full cargo of stone and scrap iron; I went below about ten minutes before collision; when I went below I left the man Logan and William Reed, this man just examined, who was on the lookout; the wind south one half west; rained a little; we headed about west of south W. ½ S.; I was called on deck by hearing the mate and foremast hand, Reed; when I came on deck vessels about 12 feet off; I saw no green light on the brig; I did not see any light; I got on brig a few minutes after collision. I went right below into the cabin; I said to the mate, after I got my wife below, could not this collision be avoided somehow or other? he said we are short-handed going down; that was all at that time; I had no other conversation with him.

11 Cross-examined:

Been captain three years at this time of this vessel; had been captain of no other at that time; I got off our vessel as quick as I could; I and my wife were off our vessel without anything but night clothes could make no after I got out.

MARK P. CHASE.

Sworn to before me this 7th day of June, 1871.

JAMES C. VOORHIES,
Notary Public, N. Y. Co.

Libellants' deposition of ALEXANDER LOGAN, of East Greenwich, Rhode Island, mariner:

Been to sea about 25 years; I was on board the Sallie Smith at the time of the collision; I was at the time of collision at the wheel, and had been so about an hour; Mr. Reid was on the lookout; wind was south; we headed west by south; that is the course there going to New York; I heard the lookout report a vessel ahead; told me to keep off; that would be to aport the wheel; I ported the wheel, and after I ported the wheel looked ahead and saw the red (port) light of the brig; I did not see any other light at any time on her; we holloaed for them to luff; our lookout halloaed; I holloaed also after he did; they did not luff; the vessels came together; she hit us on the port quarter, and ran her jibboom through our mainsail.

Q. Was anything else that you could have done to avoid the collision? (Objected to.)

A. No, sir; after we got on the brig I went into the cabin of the brig; I did not go forward at all that evening.

12 Q. Did you or not have any talk with any one on the brig as to the collision that night?

(Objection.)

A. I had with the captain of the brig; he carried us into a state-room; he said the brig would not luff in time to avoid the collision; the second mate said he never saw us until he heard us holloa; he was at the wheel; our lights were burning; we had our lights up burning at the time; we put them up at sunset; the collision took place about three miles to the north and east of the Huntington light. This light bore from us west southwest at the time of the collision; our vessel was stove in our quarter and sunk in five minutes.

Cross-examined:

Was on the Sallie Smith Smith from the preceding January; I was first mate; did not carry second mate; Captain Chase and myself were the only officers on board; Mr. Reid and another sailor were on board; he, Reed, was the only one on deck besides me before I called the rest; I don't know the name of the other sailor; there was a steward; that was all the crew, five all told; I went on board the brig as the schooner sunk; she sunk, as the captain of the brig told me, in about five minutes; no one was present at the time the captain of the brig told me his vessel would not luff; I asked the captain as I went by; the captain of our vessel was below, and I called him up, and at the time of the collision he stood beside me; he was in his berth at the time I called him; he got up then; I don't think it was over two (2) minutes from the time he came on deck before she struck; I did not hear our captain say anything to the captain of the brig about the collision; our captain took his wife on board A. L. first, and I stayed to get her things; he was aboard and had gone down into the cabin with his wife
13 when I went aboard; I did not hear any conversation from any of the hands of either about the collision.

ALEX. LOGAN.

Sworn before me this 4th day of October, 1871.

JAMES SEDWICK,
Notary Public, N. Y.

Claimants' deposition of SAMUEL PARRITT:

I am 41 years of age; I reside at Eastport, Maine, and am temporarily here in this city, and expect to go on a voyage to sea in a few days; I am a seafaring man, and am now captain of the schooner Ring Dove: in May last I was master of the brig Annie Lindsley; on or about the fifth day of that month we were at sea, having sailed from New York for Hillsborough, New Brunswick; I had seven hands, all told, and one passenger by the name of Frederick C. Noyes on board the brig; John Gladding was the mate, Henry Nicholson was second mate; these were all the officers on board besides myself; I had a collision on that night; it occurred about twenty-five minutes past eight in the evening; at the time we were off Eaton Neck light-house, which bore south southwest, and about three miles distant; we were bound east, but I could not head my course; we were heading east northeast, and going about seven knots per hour; the collision took place with the schooner Sallie Smith; I saw a light of a vessel approaching, which was a green light ahead; the lookout on my vessel sung out "a light right ahead," at the same time I heard a man sing out from the schooner to hard up my wheel; I kept our vessel off one point, which opened the light of the schooner broad on the weather bow; the schooner kept off across our bow and sung out for me to luff; I luffed by putting the wheel hard down, which caused our vessel to strike the schooner
14 aft the main rigging on her port quarter; when I say I luffed, I gave orders to second mate, Mr. Nicholson, who had the wheel, to luff all he could, and I went and assisted him in having the wheel hard down in order to avoid the collision; we did all we could to avoid collision; the schooner kept off across our bows and winged her foresail out; we were sailing close-hauled, and had the starboard tacks aboard; after we struck the schooner she sunk in about three minutes; all hands were saved; the captain and his wife were saved in their night clothes, they having turned in; our lights were all lit and burning brightly, and we had a man

stationed forward on the lookout; he was stationed at the capstain, on the topgallant forecastle; the captain of the schooner, after he came aboard our vessel, went and examined our lights to see if they were all right; he said to me that "they were all right;" when we first saw the light of the schooner she was heading west by south, and our course was east northeast; the wind being southeast, it was as near as a square-rigged vessel could sail to the wind; the schooner changed her course suddenly from west by south to northwest, which brought her right across our bow; when he saw it was too late to avoid a collision he sang out to me to luff; the captain of the schooner asked how the collision happened, and the mate of the schooner replied that he had steered his west by south course until he had made our light, as he had been ordered by the captain when he went below, and when he changed his course he thought we were heading the other way, so that he would go under our stern instead of crossing our bows; if the Sallie Smith had kept her course there would have been no collision.

SAMUEL PARRITT.

Sworn to before me this 30th Oct., 1869.

EDWARD L. OWEN,
U. S. Commissioner.

15 Claimants' deposition of HOWARD DAVIS, of Hillsborough, New Brunswick:

I am twenty-one years of age, and am seafaring man, and have been for years; I was on board brig Annie Lindsley at the time of the collision with Sallie Smith on the 7th of May, 1869; I was on the "lookout;" collision occurred at about half-past eight o'clock in the evening; I saw the green light a little on our lee bow and sung out "light ahead;" I should think the light was full half a mile off, and approaching us; I heard a cry from the schooner to keep off, and directly after was another cry for us to luff; when I first heard the cry to keep off the schooner was going to the windward of us, and she suddenly turned and kept off cross our bow; we struck her on the port quarter; our lights were both burning well, and were not lighted by any one during my watch, which began at eight o'clock and lasted till ten, I being on the lookout all that time. There was no person to make the lights if they had gone out, unless I had called them to do it; I had charge of the lights while on the lookout; we were steering, at the time of the collision, close-hauled by the wind, and was on her starboard tack.

Being cross-examined:

I was standing forward on top of the forward house when I made the light of which I have spoken; that house contains the forecastle and galley; the foremast comes down in the middle of the house; the house is from six to seven feet from the top of it to the deck; the Annie Lindsley is a brigantine.

On that night I think we were carrying all sail; I am not positive; we carry, under full sail, mainsail, gaff-topsail, main staysail, middle staysail, and main topmast staysail, foresail, topsails, and topgallant royal forestayail, jib, and flying jib.

I had been on that house about half an hour standing in the
16 same place forward of the foremast on the port side, probably two feet forward of the foremast, and about fifteen to twenty feet abaft the stem, as near as I can say.

The weather was overcast, the atmosphere a little misty, but not foggy; I suppose a six-knot breeze was blowing.

She carries one yard on her foremast; it was braced up sharp when I went on lookout; the fore and aft sails were trimmed up sharp; we were on our starboard tack, and were going to the eastward; but I can't tell what point of the compass that was.

Mr. Nicholson, Captain Parrott, and myself were on deck; there were seven all told on board, and one passenger. There were three seamen, captain, mate, second mate, and cook.

When I first saw the light I formed a judgment that it was about half a mile off; I made one light, and that was green; I saw it was green as soon as I saw it; it bore a little on our lee bow, from half a point to a point; it was nearly ahead.

I lost sight of it before the collision; I saw it and reported it, and then I did not look at it for some little time; afterwards I did look at it and saw it trying to go to windward of us, may be two minutes after I first saw it; I looked at it again; it was then going off our starboard bow, probably half a point off starboard bow; I could not tell whether there was any change in our course.

When I saw her the second time we were getting pretty close; I can form no judgment of how far it was off.

The next thing I noticed was that she kept hard off, and crossed our bows; I don't know whether I kept the light in sight after that until she kept hard off; I noticed that her course was changed and that her red light was in view, but at what particular time I don't know;
17 as soon as I saw she kept off, I jumped off the house and stood between the foremast and mainmast, but don't remember which side.

When I jumped off the house it was only a minute or two before the vessels came together.

Q. Give your best judgment as to how far the vessels were apart when you jumped down off the house?

A. I suppose three or four lengths, as near as I can come to; there may have been half a dozen.

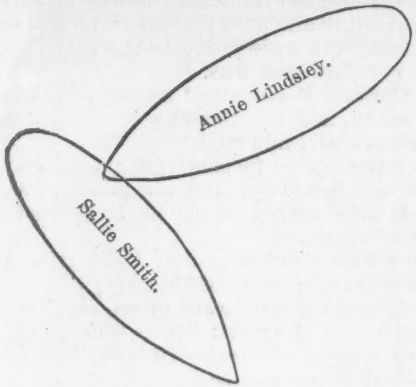
I don't know whether our vessel changed her course at all before they came together; when they came together I was standing somewhere about midships; I can't state nearer than that.

I heard something said on the Sally Smith; when I first heard the voice on the Sally Smith, I think I had got off the house, I don't remember; I heard a voice say "Keep off," and then immediately I heard a voice say "To luff;" I don't remember whether the voices sounded alike or not; I heard it distinctly.

At the time I heard the voice say "To luff," the vessels were very close together; I don't know how many I could count between the time I heard the voice say "To luff" and the strike.

Our vessel struck the schooner on the port quarter.

2. Q. Please make a diagram as to the manner in which, according to your recollection, these vessels came together.



A. The above diagram shows, as near as I can, how the vessels came together. I can't tell to what point of compass either vessel was heading at the time of the collision.

18 Redirect:

Q. You have stated that you can't tell what particular time the course of the Sally Smith was changed. Are you able to state whether it was between the times you heard the hails from the Sally Smith?

A. No; I can't say anything about the time.

HOWARD DAVIS.

Sworn to before me this 3d day of November, 1871.

EDWARD L. OWEN,
U. S. Commissioner.

Claimant's deposition of HENRY NICHOLSON, of Hillsborough, New Brunswick:

I am 36 years old and am a sea-faring man and have been 18 years. I was on board brig Annie Lindsley, as second mate, on the 7th May, 1869, when a collision took place with Sally Smith. I was at the wheel, and about 20 minutes past 8 o'clock in the evening I heard the man on the lookout sing out "A light ahead." I looked and saw a green light about one point on our lee bow. I should judge the light I saw was about one-third to a half a mile off. The wind was east-southeast to southeast; we were close hauled, on the wind; we were heading about east-northeast. I heard a man from the other vessel, as it came up, sing out "Hard up your wheel." Captain Parritt gave me orders at the same time to keep her off. I started to keep her off and turn the wheel, and just then I heard a cry from the other vessel to luff. The captain of our brig at the same time gave me orders to luff, and assisted me at the wheel. We struck the Sally Smith on her port quarter, and she sunk in about 5 minutes. The captain of the schooner and wife came aboard our brig in their night clothes. I carried his wife down into our cabin after helping her aboard. The captain came aboard in his night shirt, and our captain gave him pants and clothes to put on. Our
19 lights were burning well at the time of the collision. I never saw any one light the lights after the collision during the night. We had our complement of hands, such as we generally have on the coast. There were seven, all told, and one passenger. There were on

deck at the time of the collision the captain, myself, and Howard Davis, the latter on the lookout. The captain was standing in the gangway when the lookout first cried "Light ahead," and the captain immediately stepped on to the deck.

Cross-examination:

I went to the wheel at 8 o'clock. I came out of the cabin. My watch commenced at 8 o'clock. Mr. Gladding, our mate, and two seamen were on deck. When I came on that watch went below. Captain Parritt was on deck all the time, from the time my watch commenced until the collision, except a short time when he was standing in the gangway. There is a house on the deck; it is three feet high, I think. The wheel is abaft the house and about five feet from the taffrail. We had all our square sails and all our fore and aft sails set. We were under full sail. I should judge we were going from five to six knots. We were in ballast; we were steering full and bye. I did not pay any particular attention to the compass; I was not steering by the compass; it was before me. I can't state what definite time before the collision I had looked at the compass. My eyes were on the compass and on the sails. I can state how our vessel was heading by the compass after I took the wheel and before the collision. Five minutes past eight the brig was heading northeast by east. [The captain had asked me.] (Part in brackets objected to.) That was the last time I noticed how our vessel was heading, by compass, before the collision.

At the time I first saw the green light I judged she was from one-third to a half of a mile off. I just looked at the light and then attended to my steering; I never saw it again. I never saw any other light on her after I saw that green light; I never saw the vessel again until after we struck her. I saw her sink. She was on our port side when she sunk. We were bound to Hillsborough, New Brunswick. I can't say what was the first change I made in my wheel after I took it at eight o'clock. It is impossible for me to say how many changes I made in my wheel from the time I took it until the collision. She steers by wheel, which works athwart ships. I heard a voice from Sally Smith. I did not see her at the time I heard the voice. I can't say how near together they were; I felt the blow. The voice I heard was before I felt the blow; from a minute to a minute and a half after I heard the voice the collision happened. By comparison with the watch held at this time it was thirty-five seconds from the time I heard the voice to the time of the collision; but I won't be positive as to the time.

Redirect:

Q. How do you know how you were heading by the compass at five minutes past eight?

(Objected to.)

A. Because the captain asked me how I was heading, and I looked to see.

HENRY NICHOLSON.

Sworn to before me this 3d day of November, 1871.

EDWARD L. OWEN,
U. S. Commissioner.

Claimant's further deposition of SAMUEL PARRITT:

I reside at Eastport, Maine. The captain of the Sally Smith came aboard of our vessel as soon as his vessel commenced to sink. He was

Final decree.

At a stated term of the district court of the United States of America, for the district of New York, held at the city hall, in the city of New York, on Monday the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and seventy-five,

Present, the honorable Samuel Blatchford, district judge.

DANIEL BROWN ET AL.
against
THE BRIG ANNIE LINDSLEY, HER TACKLE, &c. } 22584.

The exceptions taken by the claimants to the report of the commission having been submitted to, and by the court overruled,

26 Now, on reading the report of John A. Osborn, esq., United States commissioner, on file, to whom the above matter was referred, by which there is reported due the libellants for damages by collision in their libel set forth, and interest, the sum of nine thousand one hundred and seventy-four $\frac{63}{100}$ dollars ($9,174$\frac{63}{100}$), on motion of James P. Ledwith, proctor for the libellants, it is ordered that the report be in all things confirmed, and that the libellants recover in this action against the brig Annie Lindsley, &c., the amount reported due, with interest thereon from September 11, 1873, (date of report), to date of this decree, amounting to eight hundred and fifty-two $\frac{81}{100}$ dollars, (852\frac{81}{100}$), together with their costs, to be taxed, and which have been taxed at two hundred and nine $\frac{66}{100}$ dollars, (209\frac{66}{100}$), in all amounting to ten thousand two hundred and thirty-seven dollars and ten cents ($10,237.10), and that said brig, Annie Lindsley, &c., be condemned therefor.

And on like motion, it is further ordered, that in pursuance of the act of Congress, passed March 3d, 1847, a summary judgment be, and the same is hereby, entered against the Albert Manufacturing Company, the principal, and Peter J. Nevins, junr., the surety on their bond, given on the discharge of the property arrested, for the sum of ten thousand dollars, the amount of their said bond, executed on discharging the said brig, &c., from custody.

And on like motion, it is further ordered, that unless an appeal be taken from this decree within the time limited and prescribed by law and the rules of this court, the libellants have execution to enforce satisfaction of this decree.

(Signed) SAM'L BLATCHFORD.

JAMES P. LEDWITH,
Proctor for the Libellant.

27 *Notice of appeal.*

U. S. circuit court, southern district of New York.

DANIEL BROWN AND OTHERS,
against
THE BRIG ANNIE LINDSLEY, HER TACKLE, &c.

SIR: Please to take notice that the claimant and appellant hereby appeals from the final decree entered herein on the 29th day of March,

1875, to the next circuit court, to be holden in and for the southern district of New York.

Yours, &c.,

A. W. SPIER,
Proctor for Claimant and Appellant, 49 William street.

To J. P. LEDWITH,
Proctor for Libellants and Respondent.

GEO. F. BETTS, Esq., *Clerk.*

28 *Petition of appeal.*

U. S. circuit court, southern district of New York.

DANIEL BROWN AND OTHERS, L'B'TS AND APPELLEES, *agst.* THE BRIG ANNIE LINDSLEY, HER TACKLE, &c., Cornelius T. Tompkins, cl'm'ts and appellants.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named claimant and appellant respectfully showeth to this court that on or about the 11th day of June, 1869, the above-named libellants and appellees exhibited their libel in the district court of the United States for the southern district of New York against the brig Annie Lindsley, her tackle, &c., praying, among other things, that the said brig be condemned and sold to pay the claim of the libellants, with costs, and that said libel mentioned claimed more than the sum of fifty dollars, besides costs, which libel was afterwards amended.

That under process issued out of this court, the said brig was attached by the marshal, and the above-named claimant appeared for the said brig, and did, on or about the 26th day of October, 1869, file his answer to said libel in said district court, praying that said libel might be dismissed with costs in that behalf, as by reference to said libel and answer will more fully appear.

29 That the said cause came on to be heard before the honorable Samuel Blatchford on or about the 9th day of January, 1871, (upon the depositions and proofs taken in said cause), and the testimony and proofs adduced by the respective parties, and on or about the eleventh day of January, 1873, upon the aforesaid evidence and proofs, said judge having advised thereon, did make a decree or sentence in said cause, whereby it was ordered and decreed that the libellants recover against the said brig Annie Lindsley the damages by them sustained by reason of the collision in the libel set forth, with costs, with a reference to a commissioner to ascertain the damages sustained by them by the collision.

Now, the reference being had, and the commissioner having filed his report on or about the 16th day of September, 1873, to which the claimant filed an exception, and said exception having been overruled on or about the 29th day of March, 1875, a final decree was made and entered, under which it was ordered, adjudged and decreed that the libellants recover herein as damages the sum of ten thousand and twenty-seven

dollars and forty-four cents, and their taxed costs, amounting to two hundred and nine dollars and sixty-six cents.

And this appellant is advised and insists that the said decree is erroneous, inasmuch as the said libel should have been dismissed with costs in said suit, and the said libellants were not entitled to recover their demand with costs, nor to any demand, amount, or any costs in that behalf, and the appellant, for these and other reasons, appeals from the whole of said final decree to the next circuit to be held in said district, and on said appeal he intends to have said cause heard anew in the circuit court upon the pleadings and proofs in the district court, together with additional testimony to be introduced by him in said circuit court.

And he prays that the record and proceedings of the district court may be returned to said circuit court, and that the said decree, and every part thereof, may be reversed with costs, or such other
30 decree thereon be made as to said circuit court shall seem just, and that the libellants and appellees may be condemned to pay the claimant and appellant his costs in the premises.

Dated April 16th, 1875.

A. W. SPEIR,
Proctor for Claimant.

Due service of a copy of the within petition of appeal is hereby admitted.

Dated April 16th, 1875.

JAMES P. LEDWITH,
Libellant's Proctor.

U. S. district court, southern district of New York.

DANIEL BROWN ET AL.
ag'st
THE BRIG ANNIE LINDSLEY.

CITY & COUNTY OF NEW YORK, *ss :*

G. M. Speir, jr., being duly sworn, says that he has compared the printed matter herein with the original papers on file in the clerk's office of said court, and that they correspond and are correct.

G. M. SPEIR, JR.

Sworn to before me this 20 day of January, 1876.

GEO. F. BETTS,
U. S. Commis'r.

31 U. S. circuit court, southern district of N. Y.

DANIEL BROWN ET AL.
ag'st
THE BRIG ANNA LINDSLEY, ETC.

Deposition of SAMUEL PARRITT, taken before E. L. Owen, esq., U. S. commissioner.

Examined by counsel for claimants :

I am 49 years of age; I live at Eastport, Maine; I was master of the Anna Lindsley; was examined as witness in the district court in this case.

Q. How long before the collision in question had your vessel tacked?
A. About 10 minutes.
Q. Where were you when you tacked?
A. I was close to Eaton's Neck light—about two miles off.
Q. Before you tacked what direction had your vessel been heading?
A. South-southwest.
Q. After you tacked, which side of the middle ground would the course you were on take you?
A. Northward.
Q. If you could have made the course you wished would you have gone to the northward or southward of the middle ground?
(Objected to.)
32 A. To the southward.
Q. Why did you not go to the southward of the middle ground?
A. I could not lay my course because the wind was ahead.
Q. When you first saw the light of the schooner where were you standing?
A. On the forward part of the break of the poop deck.
Q. Where did you see the light?
A. A point on the weather bow, starboard bow.
Q. Could you tell how far off it was?
A. I could not.
Q. How far off, in your judgment, was
A. Half a mile.
Q. Did you give any orders to the man at your wheel on seeing the light?
A. I did about that time.
Q. What was the order?
A. Keep her full.
Q. What led you to give that order?
A. The brig was too near the wind—her topgallant sail was shaking in the wind.
Q. Could you see the man at the wheel from where you stood?
A. I could.
Q. Did you see what he did when you gave that order?
A. I did.
Q. What did he do?
A. He kept the vessel full.
Q. How much, if any, change in your heading did that make?
A. Half a point.
Q. When was it with reference to your telling the man at your wheel to keep her full that you heard the hail from the other vessel to hard up your wheel?
A. But a few minutes—a minute or so—after I gave the order.
33 Q. How long after you heard that hail from the other vessel did you see the change in the course of the schooner?
A. Directly—right off.
Q. How did you know that the schooner changed her course?
A. I saw her wing her foresail out; he kept his vessel off northwest.
Q. Explain what you mean by winging the foresail out.
A. Keeping the vessel off before the wind.
Q. Before that change which side of the schooner were the booms of her foresail and mainsail?
A. On the starboard side, both of them.

Q. After that change how were they?
A. Main-boom on the starboard and the fore-boom on the port side.
Q. Did you see the foresail swing over to the port side?
A. I did.
Q. Did you give any orders to the man at your wheel when you saw that the schooner was changing her course?
A. I did.
Q. What were they?
A. Hard aport.
Q. If the schooner had not made that change of her course would the two vessels have come together?
A. They would not.
Q. How would they have passed?
A. The schooner would have crossed our stern.
Q. How far off?
A. An eighth of a mile.
Q. Where did the conversation between the captain and mate of the schooner, as to which you testified, take place?
A. In the cabin of the Anna Lindsley.
Q. Did you hear anything said in that conversation as to the look-out on the schooner?
(Objected to.)
A. I did.
34 Q. State what you heard said.
(Objected to.)
A. The captain asked the mate where Reed was; he said he was in the cabin hunting up his coat; captain turned and asked Reed what he was doing there so long; Reed said he couldn't find it; when he ran on deck he saw our vessel and told the mate at the wheel to keep the vessel off; the mate said he done so, supposing we were heading the other way; that is about what I recollect of the conversation.
Q. Do you remember whether there was anything said in that conversation as to the hail to your vessel?
(Objected to.)
A. I think there was.
Q. What?
(Objected to.)
A. Reed told the captain that he holloed to us to keep off.
Q. You had a passenger on board; what was his name?
A. Frederick C. Noyes.
Q. Was he out of health?
A. He was; he was a little out of his head.
Q. How many hails did you hear from the other vessel?
A. Two.
Q. Can you tell what the words were?
A. I can: "Keep off" first, and then "Luff."

Cross-examined:

Q. When you gave the order to hard aport, was it put hard to port?
A. It was.
Q. Hard down?
A. Hard down.
Q. How many points did you come up?
35 A. Not over three points.
Q. That would have made you heading how?
A. About east.

Q. How soon after you saw the schooner did you give the order to keep the brig full?

A. About a minute.

Q. How long after that was it that you heard the hail from the schooner to keep off?

A. Right off; just as quick as he could speak; perhaps half a minute.

Q. Did you do anything when you heard that hail to keep off?

A. Nothing.

Q. You didn't put your helm on?

A. No, sir.

Q. Why not?

A. Because I had my starboard tacks aboard and the right of way, I supposed; no right to keep off.

Q. How soon after you got the order to keep off did you get the order to luff?

A. Right off.

Q. And you did luff?

A. Yes, sir.

Q. Do you swear now that you didn't keep your vessel off?

A. I do.

Q. How do you say the wind was that night?

A. Southeast.

Q. When was it that you saw the schooner wing her foresail; was it before or after the hail to luff?

A. It was before the hail to luff.

Q. How long before?

A. About the time I heard the order to luff.

Q. Did you see the schooner wing out her foresail before or after the order to keep off?

A. She winged her foresail out before the order to keep off.

Q. How long after you first saw the schooner did you see her wing her foresail?

A. Do you mean the schooner or the light?

COUNSEL. The schooner.

36 A. At the same time; about the same time.

Q. Where was you standing at the time of the collision?

A. At the wheel.

Q. And what was you doing there?

A. Helping the second mate to heave it hard down.

Q. Was you heaving at the wheel when the vessels came together?

A. The wheel was down when we struck her.

Q. Hard down?

A. Hard down.

Q. How long had you had it hard down when you struck her?

A. Not more than two or three seconds.

Q. Hadn't you had it down more than two or three seconds?

A. No, sir.

Q. What first drew your attention to the light of the schooner?

A. The look-out calling a light ahead.

Q. Were you part owner of the Anna Lindsley?

A. No.

Q. What vessel are you on now?

A. Not any.

Q. What's your business?

A. I am a marine inspector, and connected with a lobster factory in Eastport.

Q. Marine inspector for who?

A. For the American Lloyds; employed by Hartshorne & King; one of their inspectors in Maine; they rate vessels.

Q. Is your memory of the incidents of this collision any better now than it was when you testified before in 1869?

A. Not any better. No, sir.

Q. Did you come on here for the purpose of testifying?

A. I have.

37 Q. At whose request?

A. Mr. Tompkins'.

Q. Who is Mr. Tompkins?

A. The owner of the brig Anna Lindsley, or was at that time; he lives at Newark, N. J.; he paid my travelling expenses only for coming on from Eastport; he don't give me anything for my time.

Q. You say you saw the fore-boom on the port side; do you mean that you saw the boom or the sail?

A. The boom—both.

Q. Do you remember what color it was?

A. No.

Q. You saw the boom as something distinct from the sail?

A. I did; yes, sir.

Q. Which light was it you saw when you first saw the schooner?

A. The green.

Q. Was it a very dark night?

A. Yes; very dark.

Redirect:

Q. Do you remember whether Nicholson went to the wheel before you tacked or after?

A. After I tacked.

Q. Do you mean to testify that it was after you saw the schooner wing her foresail out that you heard the first hail from the schooner?

A. No.

Q. Which was the first hail from the schooner?

A. Keep off.

Q. You were asked by Mr. Stillman this question: "Did you see the schooner wing out her foresail before the order to keep off?" and you answered, "She winged her foresail out before the order to keep off;" but you now say that she did not wing out her foresail till after you heard the order to keep off; can you explain this discrepancy?

38 A. The first was right; I got mixed; she winged out her foresail before I heard any order from her to keep off.

SAMUEL PARRITT.

Subscribed and sworn to before me this 20th day of June, 1877.

EDWARD L. OWEN,

U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,

Southern District of New York,

City, County, and State of New York, ss:

Be it remembered that on the 13th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, un-

der and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office at No. 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry Nicholson, to testify, and the truth to say, on the part and behalf of the appellants in a certain suit or matter of controversy now pending and undetermined in the circuit court of
39 the United States for the southern district of New York, at New York, wherein Daniel Brown et al. are appellees and the brig Annie Lindsley, her tackle, etc., is appellant.

And thereupon the said HENRY NICHOLSON, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry Nicholson, and he did thereupon depose, testify and say as follows, viz:

I am 44 years of age.

I was second mate on brig Annie Lindsley at time of collision with the Sally Smith.

I was examined as witness once before in court below.

My watch on deck was from 8 to 12 p. m.

Q. Did the brig tack that evening before the collision?

A. She did, to the best of my knowledge.

Q. When did she tack?

A. About 8 o'clock; it was before I went to the wheel; I did something myself in reference to tacking; I let go the lee braces and fore sheets.

Q. And how long after that did you get to the wheel?

A. Right directly after getting through tacking.

Q. When you went to the wheel was any course given you?

A. No course.

Q. Was any direction given as to your steering?

(Objected to.)

A. Yes, sir; full and by.

Q. And how did you steer her?

A. Full and by.

Q. Did you hear the report from man on lookout?

A. I did.

Q. And what was report?

A. Light ahead.

Q. Did you look, on hearing that report, yourself?

40 A. I did.

Q. How did you look?

(Objected to.)

A. I looked to leeward under main boom.

Q. And what did you see?

A. I saw a green light.

Q. How did it bear?

A. About a point on our lee bow.

Q. How long after you saw that light before you heard any hail from the other vessel?

(Objected to.)
A. I can't state the positive time.
Q. Give your best recollection.
A. Four minutes; probably five minutes.
Q. During the time from your seeing the light until you heard that hail, how were you steering your vessel?
A. By the wind.
Q. Which side of the wheel were you standing?
A. On starboard side.
Q. What was the hail you heard?
(Objected to.)
A. Keep off.
Q. What motion of your wheel would be required to make your vessel keep off?
A. To put the wheel up.
Q. Did you get any order from Captain Parritt?
A. Yes.
Q. What order?
A. Keep off.
Q. How soon was that after hearing the hail "keep off" from the other vessel?
A. Just at same instant.
Q. What did you do?
A. I started to keep her off, and gave the wheel half a revolution to starboard; then I got orders to luff from Captain Parritt.
41 Q. Did you hear a second hail from other vessel?
A. Yes.
Q. What hail?
A. To luff.
Q. Was that before Captain Parritt gave the order?
A. Before.
Q. What did you do on getting order to luff?
A. Put the wheel to port.
Q. How much?
A. I can't say positive.
Q. Did you get it hard aport?
A. No, sir; not before collision.
Q. When you put your wheel to starboard, what effect, if any, did it have on your vessel?
(Objected to.)
A. None at all.
Q. When you put your wheel to port, what effect, if any, did it have on your vessel before the collision?
A. Very little, if any; she came up in the wind some.
Q. How many revolutions of your wheel would it take to get your wheel hard up?
A. Probably eight.
Q. Did you see the lights on your vessel after the collision?
A. Yes.
Q. How came you to see them?
(Objected to.)
A. It was my duty to see to them after ten o'clock, after I left the wheel; I did not see them before that, after the collision, to notice them.
Q. Did the captain of Sally Smith go to examine your lights?
(Objected to.)
A. He did.

42 Q. When was that?
A. That was after he had been in the cabin to see his wife.
Q. Did he get his clothes on before he went to look at the lights?
A. No, sir.
Q. Did you see him go into the main rigging?
A. I did.
Q. Which side did he go?
A. I saw him go on the weather side.
Q. Did you hear him report as to the lights?
(Objected to.)
A. I did.
Q. To whom?
A. Captain Parritt.
Q. What did he report?
A. "All right! Lights all right!"
Q. Was the green light taken down that night, after the collision, during your watch?
A. Not to my knowledge.
Q. Could it have been taken down and relighted during your watch without your knowledge?
(Objected to.)
A. No, sir.
Q. Did you give any order that night to any one during your watch to light the green light?
A. I did not.
Q. While you were at the wheel, did you say to any one words to this effect, that you didn't see the other vessel or know she was ahead, but you heard the hail and had put your helm down, but the brig wouldn't luff?
(Objected to.)
A. I did not.
Q. Did you say that there was only one man on deck, and he was aft to work in the house, and that you were short-handed, or any words to that effect?
(Objected to.)
43 A. I did not.
Q. Were you short handed?
A. No.
Q. Who was on deck?
A. Capt. Parritt, myself, and Howard Davis, the lookout.
Q. Was anybody aft at work in the house?
A. Not to my knowledge.
Q. Where was Davis, and where the captain?
A. Davis was for'ard, and the captain was standing in the gangway, that was at the report of the light.
Q. Did you hear any conversation between the captain and mate of the Sally Smith that night?
A. I did.
Q. Where were they?
A. They were in our cabin—the brig's cabin.
Q. What did you hear?
(Objected to.)
A. Capt. Chase asked Mr. Logan how the collision happened; Mr. Logan stated that he didn't know our lights.
Q. What did you understand Logan to mean?
(Objected to.)

A. I understood that he didn't know which way we were heading, or didn't know our lights, which way to keep off them.

Q. Did you at any time say to Mr. Logan, or in his presence, that you never saw the schooner until you heard those on board of her halloo?

(Objected to.)

A. I did not.

Q. Was it true that you did not see her until you heard the halloo from her?

(Objected to.)

A. I saw her before I heard the halloo.

44 Q. Could you see the other vessel when the vessels came together, so as to tell in what manner the blow was struck?

(Objected to.)

A. I saw them after they came together before the Sally Smith sank. I could not tell in what way the vessels came together.

Q. What prevented you from seeing?

A. The sails. I am not attached to any vessel now.

Cross-examined:

Q. Where do you live?

A. Hillsboro', New Brunswick; my occupation is seafaring man.

Q. How long is it since you have been in a ship?

A. I came to Philadelphia last week.

Q. What ship was that?

A. Winnie Laura, of Maine.

Q. Where was the Annie Lindsley owned?

A. I can't say where she was owned; she hailed from St. John's, New Brunswick.

Q. When did you leave her?

A. In 1869.

Q. Have you been on her since?

A. Yes; one voyage since.

Q. When did you come to New York?

A. Tuesday night.

Q. At whose request?

A. Mr. Tompkins'.

Q. Cornelius T. Tompkins?

A. No.

Q. What Mr. Tompkins?

A. Joseph Tompkins.

Q. Of where?

A. Of Hillsboro', New Brunswick.

Q. Did he tell you what you were wanted for?

A. Yes.

Q. What did he tell you?

45 A. He told me to come on and give evidence in the Annie Lindsley.

Q. Did he tell you the nature of the evidence?

A. No.

Q. Have you refreshed your memory in any way as to the occurrences of that night?

A. No; not particularly.

Q. Have you in any way?

A. No.

Q. Have you read over anything purporting to be testimony in this case?

A. No.
Q. Or had it read to you?
A. I did.
Q. When and where was that?
A. At Mr. Benedict's office yesterday, where some of it was read over.

Redirect:

Q. What was it that was read to you—anything but your own testimony?
A. No; nothing.

HENRY NICHELSON.

Sworn to before me this 13th day of December, 1877.

EDWARD L. OWEN,
U. S. Commissioner.

46 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named; that the said cause is now on appeal in the circuit court of the United States for the southern district of New York from the decree of the district court for said district.

I further certify that due notification of the time and place of taking the said deposition was given by me to the proctors for the appellees, to be present at the taking of the deposition and to put interrogatories, if he or they might think fit; and that on the 13th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, I was attended by the proctors for the respective parties and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth; and the deposition, by consent, was by my appointed clerk reduced to writing in the presence of the witness and from his statements, and, after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose
47 of delivering the same with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal this 14th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[SEAL.] EDWARD L. OWEN,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York.

48 U. S. circuit court.

DANIEL BROWN ET AL.
vs.
THE BRIG ANNA LINDSLEY, &C.

Deposition of HOWARD DAVIS, taken this 29th March, 1878, for the claimants, by consent of parties, as follows:

I live in Boston; I was on the Anna Lindsley at the time of the collision in question; I was examined as a witness in the cause once before.

I remember that the brig tacked before this collision; we tacked in the early part of the evening, somewhere about eight o'clock; we were then somewheres handy to Eaton's Neck, not far from there; we were not very far off shore, a mile or two, perhaps; I think from that point, if we could have made our course, we would have gone south of the Middle Ground; I think the course we took would have carried us to the northward of the Middle Ground.

Q. Why did you not head so as to go to the southward of the Middle Ground?

(Objected to.)

A. The wind would not permit us to; after we got on this tack I was standing forward on the lee side of the forward house; I was standing there when I first saw the light of the approaching vessel.

Q. When did you first think there was danger of a collision?

(Objected to.)

A. A few minutes after I saw the light and reported it; I heard
49 the hollering aboard the other vessel, and I thought there was a chance for a smash up; I thought so because I heard them hollering luff and keep off.

Q. Did you see any change in the lights on her?

A. Yes.

Q. What change?

A. She went to the windward of us, showing a green light, I think, and I saw her port light shortly after that.

Cross-examined:

I was before the mast on board; I was on the lookout; I was not consulted about the course the brig should take that night, only I went to the wheel at ten o'clock and we were making about the same course then; there is a passage to the north of the Middle Ground; I had this much to do with selecting the course of the vessel that night, that if I was at the wheel and the wind canted enough to allow it, I would let her come up to her course.

I don't think I heard any particular orders on board that night to go to the southward of the Middle Ground.

I can't tell when I was first asked whether the brig tacked that night before the collision; I know she tacked before the collision; I could not say whether she tacked after it; I think it was dark when we tacked; it was somewhere about eight o'clock; I think the collision was about half-past eight; I think we were pretty well in under the shore, probably a mile and a half off or two miles, when we tacked; I don't remember whether I estimated that distance at that time; I could not say how far we had run on the preceding tack; I don't know how far we were from the north shore when we tacked.

My business now is in a hide and leather store; it is about four years since I left the sea.

50 I reported this light, the green light, as soon as I saw it; I think it was to the second mate at the wheel; I don't think I reported it more than once.

HOWARD DAVIS.

Sworn to this 29th day of March, 1878, before me.
[SEAL.] WM. D. JONES,
Notary Public for Kings Co., Cert. filed in N. Y. Co.

We consent that the foregoing deposition of Howard Davis be read on the appeal herein, and that the original deposition be retained by proctors for claimants and need not be filed.

BUTLER, STILLMAN & HUBBARD,
Counsel for Lib't.
JAMES P. LEDWITH, *Proctor.*

51 U. S. circuit court.

DANIEL BROWN
vs.
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C.

I hereby consent that Butler, Stillman and Hubbard be substituted in my place and stead, as proctors for the libellant herein.

JAS. P. LEDWITH,
Proctor for Libellant.

At a stated term of the circuit court of the United States for the southern district of New York, held at the court rooms in the city of New York, on the second day of September, 1878.

Present, the honorable W. G. Choate, judge.

DANIEL BROWN, LIBELLANT & APPELLEE,
vs.
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C.,
cl'm't & appellant.

52 On reading and filing the annexed consent, and on motion of Messrs. Butler, Stillman & Hubbard, it is ordered that Butler, Stillman & Hubbarb be and they hereby are substituted in the place and stead of James P. Ledwith, as proctors for the libellant and appellee herein.

W. G. CHOATE.

U. S. circuit court, southern district of New York. Daniel Brown vs. The Brig Annie Lindsley, &c. Order. Butler, Stillman & Hubbard, libellant's proctors, 111 Broadway, New York. U. S. circuit court. Filed Sept. 2, 1878. John I. Davenport, clerk.

53 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Tuesday, the eleventh day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States.

DANIEL BROWN, RICHARD BARDEN, WALTER Paine, Robert P. Raynor, et als., libellants & appellees,
vs.
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C., whereof Cornelius T. Tompkins is claimant and appellant.

The above entitled cause coming on to be heard on appeal from the decree of the district court, William A. Butler, esq., of counsel for libellants and appellees, reads from the apostles testimony on behalf of said libellants and appellees, and is heard on behalf of the same.

R. D. Benedict, esq., of counsel for claimant, appellant, reads from the apostles testimony on behalf of said claimant and appellant, and is heard on behalf of the same.

Mr. Butler is heard in reply.

Curia advisari vult.

54 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on the tenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Morrison R. Waite, Chief Justice.

DANIEL BROWN, RICHARD BARDEN, WALTER Paine, Philip D. Barden, William Brown, Daniel J. Brown, and others, libellants,
vs.
THE BRIG ANNIE LINDSLEY, HER TACKLE, APparel, and furniture, Cornelius T. Tompkins, claimant.

This cause having duly come on to be heard on the pleadings and proofs herein, on the appeal of the claimant above named from the decree of the district court, after hearing Robert D. Benedict for the claimant and appellant, and William Allen Butler for the libellants, it is now, on motion of Butler, Stilman & Hubbard, proctors for the libellants, ordered, adjudged, and decreed that the decree of the district court condemning the said brig be, and that it hereby is, affirmed, and that the libellants, Daniel Brown, Richard Barden, Walter Paine, Philip D. Barden, William Brown, Daniel J. Brown, Robert C.

55 Brown, Robert P. Raynor, William Barden, Leander Lovell, and D. Brown, recover against the brig Annie Lindsley the damages sustained by them, as assessed by the district court, to wit,

$7,069.96. seven thousand and sixty-nine $\frac{96}{100}$ (7,069.96) dollars for the loss of their schooner, the Sallie Smith, her cargo, and freight, with interest thereon from the 7th day of May, 1869, at the rate of six per cent. per annum, amounting to three thousand eight

3,891.99. hundred and ninety-one $\frac{99}{100}$ ($3,891.99) with their costs as taxed in the district court, at two hundred and nine $\frac{66}{100}$ ($209.66) dol-

209.66. lars and their costs, as taxed in this court, at ninety $\frac{10}{100}$ ($90.10) dollars, amounting in all to the sum of eleven thousand two

$11,261.71. hundred and sixty-one $\frac{71}{100}$ ($11,261.71) dollars. for which sum of eleven thousand two hundred and sixty-one $\frac{71}{0\,1\,0}$ ($11,261.71) dollars, judgment is hereby rendered in favor of the libellants.

And it is further ordered that the libellants have judgment against

the Albert Manufacturing Company and Peter J. Nevins, jr., on their bond given in the discharge of the said brig from custody for the sum of ten thousand ($10,000) dollars.

And it is further ordered that unless this decree be fulfilled or satisfied, or unless proceedings thereon be stayed on appeal by filing security required by law within ten days after service of a copy
56 of this decree upon the proctor for the claimant, the stipulation on the appeal to this court, Calvin Tompkins and George S. Wood, cause the engagement of their stipulations to be performed, or show cause within four days after the expiration of the said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels, and lands.

M. R. WAITE,
Chief Justice.

(Endorsed:) U. S. circuit court, southern district of New York. Daniel Brown, Richard Barden, and others, libellants, vs. The brig Annie Lindsley, her tackle, &c. Final decree. Butler, Stillman, & Hubbard, proctors for libellants, No. 111 Broadway, New York. U. S. circuit court. Filed Sept. 4, 1878. John I. Davenport, clerk.

Within decree approved as to form and amount.
N. Y. August 27th, 1878.

R. D. BENEDICT, *Adv.*

57 *Bill of exceptions.*

U. S. circuit court for the southern district of New York, in the second circuit.

DANIEL BROWN, RICHARD BARDEN, WALTER Paine, Philip D. Barden, William Brown, Daniel J. Brown, Robert C. Brown, Robert C. Raynor, William Barden, Leander Lovell, and D. Brown, libellants & appellees,
against
THE BRIG ANNIE LINDSLEY, HER TACKLE, apparel, &c., Cornelius T. Tompkins, claimant & appellant.

This cause came on for trial before the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at a term of the circuit court of the United States in and for the southern district of New York, in the second circuit, on the twenty-third day of May,
58 1878, on the appeal by the claimant from the final decree of the district court of the United States for the southern district of New York, awarding the libellants damages, for the reasons and causes in the libel mentioned.

Counsel for libellants read the libel, and counsel for the claimant read the answer as the same were contained in the apostles transmitted from said district court to said circuit court.

Counsel for libellants then put in evidence the testimony taken and the depositions read on behalf of the libellants in the district court, as the same were contained in the apostles, it being considered that the counsel for libellants read the direct examination, and that counsel for claimant read the cross-examination.

Counsel for the claimant then put in evidence the testimony taken

and the depositions read on behalf of the claimant in the district court as the same were contained in the apostles, it being considered that the counsel for claimant read the direct and counsel for libellants
59 read the cross-examination.

Counsel for claimant also put in evidence the depositions of the following witnesses, taken in the circuit court and on file in the said circuit court, viz.: Samuel Parritt, Henry Nicholson, and Howard Davis, it being considered that said counsel for claimant read the direct, and that counsel for libellants read the cross examination.

And here the testimony was closed.

Counsel for claimant thereupon proposed on his behalf the following findings of fact and conclusions of law to be found by the court, viz:

U. S. circuit court.

DANIEL BROWN ET AL.
vs.
THE BRIG ANNIE LINDSLEY, C. T. TOMPKINS, claimant & appellant.

Proposed findings of fact on the part of the claimant and appellant.

First. On the night of May 7, 1869, the brig Annie Lindsley
60 was on a voyage from New York, eastward, through Long Island Sound.

Second. The wind was about southeast and the brig had tacked a short time before the collision, being then in the neighborhood of Eaton Neck. She then came on the starboard tack; she was unable to lay her course, which would have carried her south of the Middle Ground, but was compelled to head east-northeast, which would carry her north of the Middle Ground; and from the time when she tacked she was running close hauled on the starboard tack, steering full and by.

Third. The brig had the regulation lights properly set and burning brightly; she had a full crew of seven, all told; she had a competent man forward on the lookout, and a competent officer, the second mate, at the wheel, both of whom fully performed their duties, and her master was also on deck aft.

61 Fourth. While so navigating, and about half-past eight o'clock, p. m., the green light of a vessel, which proved to be the schooner Sallie Smith, was seen by the lookout almost direct ahead, but a little on the lee bow, & he reported a light ahead, the light then being about half a mile distant.

Fifth. The schooner was sailing with the wind free, and in such a direction that the green light, as the vessels approached, drew across the course of the brig until it was about a point on the starboard bow of the brig, in which position each vessel was showing her green light to the other.

Sixth. No sufficient lookout was kept on board of the schooner, and the light of the brig was not seen by those on board of the schooner as soon as it should have been.

Seventh. The man who had been stationed on the lookout on
62 the schooner, had left his post and gone below shortly before the brig approached near enough to be visible, and on his coming on deck he saw the light of the brig, which had not till then been seen by those on the schooner.

Eight. If the light of the brig had been seen as soon as it would have been if a careful lookout had been kept on the schooner, those on the schooner would have known at the time that they actually saw the light that the vessels were then on diverging courses, and that each vessel would pass on the starboard side of the other unless some change of course was made by one of them.

Ninth. In the alarm caused on board the schooner by the sudden discovery of the brig so near to them, those on the schooner hailed the brig to keep away, and almost immediately thereafter hailed her to luff; & when the brig was hailed to luff, the helm of the schooner was ported and her course changed so as to cross the course of the brig, & before the collision she had so changed her course as to wing out her foresail.

63

Tenth. On hearing the hail to luff & seeing this change of course of the schooner, the helm of the brig was also put hard aport, but the vessels were then so near that before the schooner could entirely cross the bows of the brig the brig struck her on her port quarter, doing her such injury that she shortly afterward sunk.

Eleventh. No change of direction of the brig was made before the helm was put to port, although before that change of the helm there had been an order to starboard her helm, when the first hail was heard on board of her to keep away, but that order was countermanded before it was complied with by the man at the wheel, and had no effect upon the course of the brig.

64

Twelfth. The mate of the schooner, who was at her wheel, kept that vessel off under a mistake as to the direction in which the brig was heading.

Thirteenth. As the vessels were at the time when the mate of the schooner kept her off, the vessels would have gone clear of each other, if he had not done so.

PROPOSED FINDINGS OF LAW.

First. As the vessels were sailing, it was the duty of the schooner to keep out of the way of the brig, and the duty of the brig to hold her course.

Second. The schooner was in fault in not keeping out of the way of the brig.

Third. The schooner was in fault in not keeping a vigilant and faithful lookout, and in not seeing the light of the brig as soon as she should have done, and in not taking earlier measures to keep out of the way of the brig.

65

Fourth. The schooner was in fault in porting her helm after she had passed the line of the brig's direction, so as to be off the starboard bow of the latter.

Fifth. The schooner was in fault in giving contradictory hails to the brig.

Sixth. The brig was not in fault in reference to the collision.

Seventh. The libel should be dismissed with costs.

H. W. SPEIR,
Proctor for App'l't.
R. D. BENEDICT,
Advocate.

The court filed with the clerk of said circuit court the findings of fact and conclusions of law as found by the court in the form following, viz:

66 Circuit court of the United States, southern district of New York.

DANIEL BROWN ET AL., LIBELLANTS & APPELLEES,
vs.
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C.

Facts found by the court.

1. About half-past eight o'clock on the evening of May 7, 1869, the brig Annie Lindsley collided with and sunk the schooner Sallie Smith, in Long Island Sound, between two and three miles north and east of Eaton's Neck. The sky was overcast and there was a little rain, but no mist or fog, though it was quite dark. The wind was fresh and east of south. Its precise direction is not satisfactorily shown. The water was not rough.

2. The schooner, of 96 tons new measurement and 106 old, was bound from Connecticut River to New York, with a cargo of brown
67 stone and scrap iron. When the brig was first discovered by those on board the schooner she (the schooner) was heading on her regular course through the Sound, which was W. by S., and had her port tacks aboard. Her regulation lights were set and burning brightly. Her mate was at the wheel and a competent lookout at his post on deck forward of the windlass.

3. The Annie Lindsley, a brigantine of 220 tons British measurement, was bound east from New York to Hillsborough, New Brunswick, in ballast. She was steering by the wind and not by the compass, and was heading as near on her course through the Sound as the wind would permit. Her general direction was about E. N. E., which was a little to the northward of her regular course. Her master was on deck, the second mate at the wheel, and one man forward, properly stationed as a lookout. Her regulation lights were set, and she had her starboard tacks aboard.

4. Both vessels were sailing under full canvass.

68 5. When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, and on courses involving the risk of collision. The brig was close-hauled. The schooner had the wind a little free.

5. A short time before the collision the lookout on the schooner discovered the brig about dead ahead. He saw no lights, but made out the vessel and her sails coming, as he judged, from an opposite direction. He at once reported to the man at the wheel, who put the wheel to port and bore off, until he opened the red light on the brig.

6. The schooner was not discovered from the brig until after the brig was discovered from the schooner. The lookout was the first to see the schooner from the brig, and he called out "light right ahead." Almost at the same moment a hail was heard from the schooner. The
69 brig's wheel was then put to starboard, and she swung off one point. As soon as this movement could be discovered, another hail came from the schooner to luff, and the wheel was put to port, but before it could materially affect the course of the brig the two vessels came together, the brig striking the schooner on the port quarter, the jib-boom of the brig passing through the main sail of the schooner. The schooner sank in a very few minutes with her cargo, and was a total loss.

7. The starboarding of the brig was the direct cause of the collision.

8. The value of the schooner at the time she was lost was five thousand dollars.

Conclusions of law.

1. The brig was in fault for starboarding her wheel, and this was the cause of the collision.

2. The libellants are entitled to a decree for the value of the
70 schooner, cargo, and freight, as reported by the commissioner, with interest at six per cent. from May 7, 1869, the date of the loss.

And also filed with said clerk his opinion, as follows, viz:

WAITE, *Ch. J.*

The testimony taken by the claimants since this appeal is not of a character to inspire confidence in its credibility. It is quite impossible to reconcile it with the statements of the same witnesses in their depositions used at the hearing below. Especially is this true of the captain. He gave one deposition Oct. 30, 1869, which was less than six months after the collision occurred, and when the facts which transpired must have been comparatively fresh in his recollection. The witnesses on the part of the libellants were all then examined, and after that the witnesses for the claimant, the captain being again called to testify as to
71 some facts made material by what had been sworn to upon the other side. All this was done within eighteen months of the accident, and the trial did not take place until more than a year afterwards. There could, therefore, have been no surprise on the part of the complainants, and if what is now sworn to was true there was time enough to prove it before the trial, and the parties had every reason to do so.

Taken as the testimony has been now, more than eight years after the occurrences happened, and with a view to meet the case as found by the court below, it ought not to receive much consideration, unless supported by strong corroborative circumstances. Such is not the case. The statements must stand or fall by themselves. The contradictions are palpable, and in respect to the most material facts. The omissions, if true, are inexcusable. For these reasons, it is not difficult to decide that the case made here is substantially the same as that which appeared below.

72 It is clear from the testimony that the vessels must have been approaching each other end on, or nearly end on. It is admitted the course of the schooner was W. by S., and the claimants do not contend that of the brig was more north of east than E. N. E. If, then, the courses were precisely as claimed by the brig, there was only a variation of one point between them. It is doubtful, however, whether it was as much as that. The brig was steering by the wind, and the witnesses judge of her course by that of the wind, which they say was S. E., and E. N. E. was as close as she could sail. If, then, the wind varied at all from S. E. her course would be correspondingly changed. The variation, if any, was undoubtedly to the west rather than the east, because the witnesses on the schooner think the wind was W. of S. and that their vessel was close hauled. As will hereafter be seen, this was
73 probably not precisely in accordance with the truth, but there can be no doubt that she was hauled well down. Any variation of the wind to the westward of S. E. would lessen the variation between the courses of the vessels. The man at the wheel of the brig does not say that she was heading exactly E. N. E., but about that course.

But in addition to this the vessels were actually seen from each other nearly dead ahead. The lookout from the schooner, who is the only

person on her who saw the light until the course was changed, says, when he first saw it, "it bore about dead," and he "reported the vessel ahead and told him (the man at the wheel) to swing her off." The call of the lookout on the brig, who was the first to discover the light of the schooner, was, "light right ahead," and after the brig had been kept off only one point the light was opened broad on the starboard bow. All three of the witnesses on the brig say that when they
74 first looked it was a little off the port bow.

Under these circumstances it may certainly be assumed that the meeting of the vessels end on, or nearly end on, is established by the testimony on both sides.

It is also satisfactorily proven that, although the vessels were both sailing pretty close to the wind, the brig was close hauled and the schooner had the wind a little free. The schooner was making her regular course. It was not, therefore, important to watch the wind and the sails as particularly as it would have been if she had been close hauled. It was enough if she could be kept on her course. In fact her mate, who was at the wheel, does not say she was close hauled. With the brig, however, it was different. She could not make her course, or if she could, it was with difficulty. I place no confidence in the testimony taken since the appeal to show that she tacked just before the collision. With the wind S. E., or nearly so, no such movement
75 could, under ordinary circumstances, have been required at that point. It was only when it became necessary to come up more into the wind, in order to follow the sound as it bore to the eastward, that the brig could not have made her course with a S. E. wind. But still, I think, the preponderance is clearly in favor of the claims of the brig as to the manner in which the two vessels were sailing, and this, too, without discrediting at all the testimony of the witnesses of the schooner on that point. The schooner was undoubtedly hauled well down, but not entirely close.

The vessels then when each saw the other occupied these positions:

1. They were approaching each other end on, or nearly end on.

2. The brig was close hauled and the schooner sailing with the wind to some extent free; and

3d. The schooner had the wind on her port side.

Under these circumstances the sailing rules either required the
76 two vessels to port their wheels and pass each other on the port side, or the brig to keep her course, and the schooner to keep out of the way. In any view of the case it was palpably wrong for the brig to put her wheel to starboard. She should have ported or held her course.

It cannot for a moment be believed that the green light on the schooner could, at the time, have been seen from the brig without the red light being exposed. Both the lights must have been burning, for both were seen before the collision. The vessels could not have been more than half a mile apart, and it is exceedingly doubtful whether they were as much as that. With the conceded course of the two vessels, if one light was seen the other ought to have been, unless hidden by some accidental circumstance. The subsequent discovery of the red light, therefore, does not necessarily indicate any radical change in the course of the schooner, and the apparent heaving off of the schooner across
77 the bow of the brig is probably owing to the falling off of the brig under her change of helm, and the natural effect of the schooner to keep her red light open. Under such circumstances the appearance of the green light was no justification for the starboarding of the brig.

It is claimed, however, that the vessel was kept away because of a call to that effect from the schooner. In their testimony below, the lookout said the call was to "keep off," and the captain and second mate to "hard up your wheel;" but, in that taken since, the captain and mate both say the words were "keep off," and the lookout that he thought there was a chance of a smash up, because he "heard them hollering luff and keep off." The lookout on the schooner says, "We hailed and hailed from our vessel, and I told them to luff;" and the man at the wheel, we holloed for them to luff; our lookout holloed; I holloed also after
78 he did." This shows that whatever the actual language of the hail was it never could have been intended as an order to put the wheel up, and keep the vessel away from the wind. "Keep off," if used at all, meant to keep off the vessel, not to keep off on the wind, and that those on the brig ought so to have understood is evident from all the circumstances. In fact the captain, in his last deposition, says he did not obey the call because he knew it was wrong. When the hail was heard the vessels were close together. According to the testimony of the witnesses on the brig, even, the schooner could not have been to the windward, for they all saw her from their port bow, and she was only brought to the starboard by the change of their own course. To pass on the starboard side would, therefore, require her to come up more into the wind, and she was already hauled well down. Under such circumstances an order from the schooner to starboard the wheel of the
79 brig would be improbable and ought not to have been obeyed upon any uncertainty. It is conceded that as soon as the surging off of the brig could have been discovered upon the schooner the call to luff came. This furnishes the strongest evidence that no order to put the wheel up could have been given, and that there was not on that account any excuse for the fault of the brig.

The claim that the schooner suddenly changed her course from W. by S. to N. W., and undertook to cross the bow of the brig, is contradicted by many circumstances. The second mate at the wheel of the brig, with her sails to port and her starboard side all clear, never saw the vessel until he saw her sinking, and then she was on the port side of the brig. She could not have crossed the bow of the brig, unless she had been to the starboard, and if she had been at the distance
80 she was, the wheelsman must have seen her. And then again, according to the captain's own testimony, the call to luff came as soon as he noticed the change of course.

This shows clearly that the change, if any, was made at the very moment of the collision, to counteract the fault of the brig in starboarding, and to give additional effect to her luffing, if that call should be obeyed.

On the whole I am clearly of the opinion that the collision occurred through the fault of the brig in starboarding her wheel, and that the schooner is not in any manner justly responsible for that movement. The brig is, therefore, chargeable with all the damages resulting from the collision.

An exception was taken to the commissioner's report, because he stated the value of the schooner to have been $5,000. Upon that
81 question I have had more doubt than any other in the case, but think on the whole that the finding of the commissioner is sustained by the preponderance of the evidence.

As no other exceptions were taken to the report, let a decree be prepared in favor of the libellants for the value of the vessel, cargo, and freight, as reported by the commissioner, with interest at the rate of six per cent. from May 7, 1869, and costs in both courts.

And thereafter, and on the 5th day of October, 1878, counsel for claimant filed in the office of said clerk, and served upon libellants, proctors' exceptions to said findings of the court, and to the failure of the court to find as requested, as follows, viz:

U. S. circuit court, southern district of New York.

DANIEL BROWN & ALS., LIBL'T & APPELLEES,
ag'st
82 THE BRIG ANNIE LINDSLEY, HER TACKLE, &c., Cornelius T. Tompkins, cl'm't & appl't.

Exceptions of the appellant to the findings of the court, and to the failure of the court to find as requested.

First. He excepts to the first finding of fact that on the night of the collision the precise direction of the wind is not satisfactorily shown.

Second. He excepts to the second finding that when the brig was first discovered by those on board of the schooner, the schooner was heading on her regular course through the sound which was west by south, and had her port tacks aboard, and had her regulation lights set & burning brightly, and that her mate was at the wheel, and a competent lookout at his post on deck forward of the windlass.

Third. He excepts to the third finding that the Annie Lindsley was steering by the wind and not by the compass.

83 Fourth. He excepts to the part of the fifth finding that when the brig was discovered from the schooner, the two vessels were approaching each other end on or nearly end on and on courses involving the risk of a collision.

Fifth. He excepts to the part of the sixth finding that the schooner was not discovered from the brig until after the brig was discovered from the schooner.

Sixth. He excepts to part of the sixth finding that the brig's wheel was put to starboard and she swung off one point.

Seventh. He excepts to the seventh finding that the starboarding of the brig was the direct cause of the collision.

Eight'. He excepts to the eight' finding that the value of the schooner at the time she was lost was five thousand dollars.

Ninth. He excepts to the part of the first conclusion of law that the brig was in fault in starboarding her wheel.

Tenth. He excepts to the part of the first conclusion of law that the starboarding of the wheel was the cause of the collision.

84 Eleventh. He excepts to the second conclusion of law that the libellants are entitled to a decree for the value of the schooner, argo, and freight, as reported by the commissioner, with interest at six per cent. from May 7th, 1869.

Twelfth. He excepts to the failure to find the claimant's second proposed finding of fact.

Thirteenth. He excepts to the failure to find the claimant's third proposed finding of fact.

Fourteenth. He excepts to the failure to find the claimant's fourth proposed finding of fact.

Fifteenth. He excepts to the failure to find the claimant's fifth proposed finding of fact.

Sixteenth. He excepts to the failure to find the claimant's sixth proposed finding of fact.

Seventeenth. He excepts to the failure to find the claimant's seventh proposed finding of fact.

Eighteenth. He excepts to the failure to find the claimant's eight' proposed finding of fact.

85 Nineteenth. He excepts to the failure to find the claimant's ninth proposed finding of fact.

Twentieth. He excepts to the failure to find the claimant's tenth proposed finding of fact.

Twenty-first. He excepts to the failure to find the claimant's eleventh proposed finding of fact.

Twenty-second. He excepts to the failure to find the claimant's twelfth proposed finding of fact.

Twenty-third. He excepts to the failure to find the claimant's thirteenth proposed finding of fact.

Twenty-fourth. He excepts to the failure to find the claimant's first proposed finding of law.

Twenty-fifth. He excepts to the failure to find the claimant's second proposed finding of law.

Twenty-sixth. He excepts to the failure to find the claimant's third proposed finding of law.

Twenty-seventh. He excepts to the failure to find the claimant's fourth proposed finding of law.

86 Twenty-eight'. He excepts to the failure to find the claimant's fifth proposed finding of law.

Twenty-ninth. He excepts to the failure to find the claimant's sixth proposed finding of law.

Thirtieth. He excepts to the failure to find the claimant's seventh proposed finding of law.

A. W. SPEIR,
Appl't's Proctor.
R. D. BENEDICT,
Advocate.

That a final decree was made by the court affirming the decree of the district court and awarding the libellants the sum of eleven thousand two hundred and sixty-one $\frac{71}{100}$ dollars, damages and costs.

And inasmuch as the said several matters produced and given in evidence on the trial in said circuit court and by counsel for said claimants objected and insisted on, & the said exceptions do not appear by the record of the decree of said court, the counsel

87 for said claimant has prepared and caused this bill of exceptions to be settled as a record thereof, according to the form of the statute in such case made and provided, and the practice of the court, and to be signed and filed.

M. R. WAITE.

Approved as to form.

BUTLER, STILLMAN & HUBBARD,
Proctors for Lib'ts & Resp'ts.

88 (Indorsed:) U. S. circuit court. Daniel Brown & al. v. brig Annie Lindsley, her tackle, &c. Bill of exceptions. A. W. Speir, appl'ts' proctor; R. D. Benedict, advocate, 64 Wall street, New York. U. S. circuit court. Filed Oct. 14, 1878. John I. Davenport, clerk.

89 Circuit court of the United States for the southern district of New York, in the second circuit.

RICHARD BARDEN, WALTER PAINE, PHILIP D. Barden, William Brown, David J. Brown, Robert C. Brown, Robert P. Raynor, William Barden, Leander Lovell, & D. Brown, libellants & appellees,
against
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C., & Cornelius T. Tompkins, claimant & appellant.

To the honorable the Supreme Court of the United States:

The appeal of Cornelius T. Tompkins, the above-named claimant and appellant, respectfully shows:

That on or about the 19th day of December, 1872, the libellants filed their amended libel in the district court of the United States for the southern district of New York against the brig Annie Lindsley, her tackle, &c., in a cause of collision, civil and maritime, for the re-
90 covery of the damages by them sustained by reason of the matters and things in said libel mentioned.

That process was duly issued against said brig under which she was seized, and the claimant thereafter duly appeared and claimed said brig and gave bonds, and she was thereupon discharged from custody.

That thereafter and on or about the 24th day of December, 1872, the claimant and appellant filed his answer in said cause and such proceedings were thereupon had in said cause, that on the 29th day of March, 1875, a final decree was made therein by said district court, wherein it was adjudged that the libellants & appellees recover herein the sum of ten thousand two hundred and thirty-seven $\frac{10}{100}$ dollars, their damages and costs.

That thereafter this appellant duly appealed to the circuit court o the United States for the southern district of New York, and the said cause was removed thereby into the said circuit court & there heard anew. That such proceedings were thereupon had in said circuit court; that on the 10th day of July, 1878, a final decree was made by
91 said court & duly entered & filed on the 4th day September, 1878, whereby it was ordered and decreed that the libellants and appellees recover in this cause the sum of eleven thousand two hundred and sixty-one $\frac{71}{100}$ dollars, damages and costs, which said decree of the said circuit court is, as this appellant is advised, erroneous & ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of said circuit court and the libel, answer, pleadings, depositions, evidence, findings, proposed requests to find, and exceptions to findings & refusals to find, if any, and all other papers and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, & that the said Supreme Court will proceed to hear the said cause anew, & that the said decree of the circuit court & every part thereof may be reversed & the libel dismissed with costs or that such other decree may be made as to said court shall seem just.

A. W. SPEIR,
Proctor of Appellant.
92 ROBERT D. BENEDICT,
Advocate.

93 (Indorsed:) U. S. circuit court. William Brown & al. vs. Brig Annie Lindsley, &c. Copy appeal. A. W. Spier, proctor, R. D. Benedict, advocate, 64 Wall street, New York, for Butler, Stillman & Hubbard, esq. U. S. circuit court. Filed Sept. 12, 1878. John I. Davenport, clerk.

94 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

DANIEL BROWN, RICHARD BARDEN, WALTER Paine, Philip D. Barden, William Brown, Daniel J. Brown, Robert C. Brown, Robert P. Raynor, William Barden, Leander Lovell, & D. Brown, libellants & appellees,
against
THE BRIG ANNIE LINDSLEY, HER TACKLE, &C., Cornelius T. Tompkins, claimant & appellant.

Know all men by these presents that we, James G. Lindsley, of Roundout, New York, & Calvin Tomkins, of Tomkins Cove, Rockland County, in the State of New York, are held and firmly bound unto the above-named libellant & appellees, in the sum of twenty-three thousand dollars, to be paid to the said libellants & appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the third day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named claimant & appellant has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect and answer all damages and costs if he fail to make his said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CALVIN TOMKINS. [L. S.]
JAS. G. LINDSLEY. [L. S.]

Sealed and delivered, and taken and acknowledged this 3 day of Oct., 1878, before me.

[L. S.] W. D. JONES,
Notary Public for Kings Co. Cert. filed in N. Y. Co.

95 UNITED STATES OF AMERICA,
Southern District of New York, ss:

James G. Lindsley & Calvin Tomkins, being duly sworn, each deposes and says that he resides in the State of New York, and that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

CALVIN TOMKINS.
JAS. G. LINDSLEY.

Sworn to this third day of October, A. D. 1878, before me.
[L. S.] W. D. JONES,
Notary Public for Kings Co. Cert. filed in N. Y. Co.

Approved Oct. 4, 1878.

SAM'L BLATCHFORD.

(Indorsed:) Vol. , page . U. S. circuit court. Daniel Brown & others vs. The Brig Annie Lindsley, her tackle, &c. Bond for damages & costs on appeal. A. W. Speir, app'l't's proctor; R. D. Benedict, advocate. Filed this day of 18 . U. S. circuit court. Filed Oct. 4, 1878.

JOHN I. DAVENPORT, *Clerk.*

96 By the honorable Samuel Blatchford, judge of the circuit court of the United States for the southern district of New York.

To Daniel Brown, Richard Barden, Walter Paine, Philip D. Barden, William Brown, Daniel J. Brown, Robert C. Brown, Robert C. Raynor, William Barden, Leander Lovell, and D. Brown:

Whereas Cornelius T. Tompkins, claimant of the brig Annie Lindsley, her tackle, &c., has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, against the brig Annie Lindsley, her tackle, &c., and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of Oc-
97 tober, 1878, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the fourth day of October, 1878, and of the Independence of the United States the one hundred and third.

SAM'L BLATCHFORD.

(Endorsed:) U. S. Supreme Court. Daniel Brown et al. v. The Brig Annie Lindsley, her tackle, &c. Citation. A. W. Speir, app'l't's proctor; R. D. Benedict, advocate, 64 Wall st., New York. We admit due service of the within citation, the same as if personally served on the libellants. N. Y. Oct. 4, 1878. Butler, Stillman & Hubbard, proctors for libellants. U. S. circuit court. Filed Oct. 9, 1878. John I. Davenport, clerk.

98 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to ninety-seven inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Daniel Brown, Richard Barden, Walter Paine, Philip D. Barden, William Brown, Daniel J. Brown, Robert C. Brown, Robert P. Raynor, William Barden, Leander Lovell, and D. Brown, libellants and appellees, against The Brig Annie Lindsley, her tackle, &c., Cornelius T. Tompkins, claimant and appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be

hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of October, in the year of our Lord one thousand eight hundred and sventy-eight, and the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 343. The brig Annie Lindsley, her tackle, &c. Cornelius T. Tompkins, claimant, appellant, vs. Daniel Brown, Richard Barden, Walter Paine, Philip D. Barden et al. S. New York. C. C. U. S. Filed 19th November, 1878.

REC. 343—4

Supreme

OF THE UNITED STATES.

THE BRIG ANNIE LINDSLEY, her tackle, &c., CORNELIUS TOMPKINS, Claimant and Appellant,

against

DANIEL BROWN *et al.*, Libellants and Appellees.

No. 97.

Brief and Points for Appellants.

This is an appeal from a decree of the Circuit Court for the southern district of New York, affirming a decree of the District Court in favor of the libellants.

The action was for collision, and was brought by the owners of the schooner Sallie Smith, which was sunk in a collision with the brig Annie Lindsley on the night of May 7, 1869, in Long Island Sound.

There was an issue on the pleadings as to the direction of the wind, which the libel alleged to have been about south ½ west (fol. 2), and the answer alleged to have been about south-west (fol. 5). The Circuit Judge found so far in favor of the appellants as to find that the wind was east of south, instead west of south (1st finding).

There was also an issue on the pleadings as to which vessel was close hauled. Each party in his pleading averred that his own vessel was close hauled and that the other vessel was free (Libel fol. 3; Ans. fol. 6). On this issue the Circuit Judge

found with the appellants, holding that the schooner was sailing free and the brig was sailing close hauled.

There was also an issue as to the lights. Each vessel averred that her lights were set, and that the other vessel's were not. The Circuit Judge found that both vessels had the regulation lights set.

There was furthermore an issue as to lookout. The schooner averred that she had a "competent lookout" "carefully attending to his duty," and that the brig did not have "a proper and careful lookout." Both of these allegations were denied by the brig, and she alleged that the schooner was in fault in "not having a careful and proper lookout."

The Circuit Judge found that the schooner had "a competent lookout at his post," "when the brig was first discovered" (2d finding), also that the brig had "one man forward properly stationed as a lookout" (3d finding).

The effect of these findings in connection with the other findings is to be considered.

The course of the schooner was averred in the libel to have been about west. In the answer it was averred to have been west by south. The Circuit Judge found that she was steering W. by S.

The course of the brig was not averred in either libel or answer, except that the libel by implication averred that she was sailing free, while the answer averred that she was close hauled, which would be East North East with the wind South East, as the answer averred it to be. The Circuit Judge found that she was close hauled and that her course was "about E.N.E. which was a little to the northward of her regular course" (3d finding).

The issues on the pleadings, and the finding of the Circuit Court in reference to them, being thus set forth, we make, on behalf of the claimants of the Annie Lindsley, the following

Assignment of Errors.

First.—The Circuit Court erred in finding as matter of law that the brig was in fault for starboarding her wheel.

Second.—The Court erred in finding that the starboarding of the brig's wheel was the cause of the collision.

Third.—The Court erred in finding that the libellant were entitled to a decree.

Fourth.—The Court erred in refusing to find as requested to find by the fourth request of the claimants.

Fifth.—The Court erred in refusing to find as requested to find by the fifth request of the claimants.

Sixth.—The Court erred in not finding as requested to find by the sixth request of the claimants.

Seventh.—The Court erred in not finding as requested to find by the seventh request of the claimants.

Eighth.—The Court erred in not finding as requested to find by the eighth request of the claimants.

Ninth.—The Court erred in not finding as requested to find by the ninth request of the claimants.

Tenth.—The Court erred in not finding as requested to find by the tenth request of the claimants.

Eleventh.—The Court erred in not finding as requested to find by the eleventh request of the claimants.

Twelfth.—The Court erred in not finding as requested to find by the twelfth request of the claimants.

Thirteenth.—The Court erred in not finding as requested to find by the thirteenth request of the claimants.

Fourteenth.—The Court erred in not finding the first, second, third, fourth, fifth, sixth and seventh conclusions of law, as requested by the claimants, and each of them.

Fifteenth.—The Court erred in finding that "when the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on and on courses involving the risk of collision."

Sixteenth.—The Court erred in finding that "the schooner was not discovered from the brig until after the brig was discovered from the schooner."

First Point.

The Circuit Court found as a conclusion of law, that the brig was in fault for starboarding her wheel.

This we claim to have been an error.

(*a*) We must look at the facts which the Court found, which bear on this question. They are these:

1. The brig was sailing by the wind about east northeast, close-hauled on the starboard tack.

2. The two vessels were approaching each other end on, or nearly end on, on courses involving risk of collision.

3. The lookout on the brig saw the schooner and called out, "Light right ahead!"

4. Then the brig's wheel was put to starboard and she swung off a point; and then on hearing a hail to luff, her helm was ported.

(*b*) The finding of law on these facts amounts to laying down this rule, viz: That a vessel close-hauled on the starboard tack, seeing a light right ahead, is in fault if she starboards.

This, we insist, is error. It is stating the rule too broadly. Whether a vessel is in fault for starboarding on seeing a light ahead depends upon what the light is.

(*c*) The light which was seen ahead of the Annie Lindsley was a *green* light.

Ans., fol. 7.
Ev. of Parritt, fol. 13.
Ev. of Davis, fols. 15, 16.
Ev. of Nicholson, fols. 18, 19.
Fourth Request to Find, fol. 61.
Fourteenth Exception, fol. 84.
Opinion, fols. 73 and 76.

Thirteenth.—The Court erred in not finding as requested to find by the thirteenth request of the claimants.

Fourteenth.—The Court erred in not finding the first, second, third, fourth, fifth, sixth and seventh conclusions of law, as requested by the claimants, and each of them.

Fifteenth.—The Court erred in finding that "when the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on and on courses involving the risk of collision."

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Fourteenth Exception, fol. 84.
Opinion, fols. 73 and 76.

The Circuit Court did not find that the light was a *green* light, but found only that it was a light.

But, in a matter which is not covered by the findings at all, we claim that the Court should look into the evidence. Especially so when, as here, there is no conflict of evidence on the point, and where a request to find in accordance with that evidence was duly made.

This Court has declared that it is "no longer called on to weigh evidence." But this is not weighing evidence.

(*d*) Now when a vessel sees a *green* light ahead, she is not in fault for starboarding.

As Commander Colomb says (Rule of the Road at Sea, p. 107): "Instinct alone will make a man call out, "hard a starboard" if a powerful green light appears suddenly before him at sea.

And that this is correct navigation is sustained by powerful authority.

See diagram on p. 135 of Jenkins' Rule of the Road at Sea, and the instruction at foot "Where A sees B's masthead *and green light only*, but B sees A's three lights, each *vessel should starboard* her helm, or B continuing her course, A should *starboard*."

See also the following quotations from the same work:

Article II. does not apply "where a red light without a green light or a green light without a red light is seen ahead." Order in Council of July 30, 1868. (Rule of the Road, p. 44).

"Green light right ahead—starboard the helm." *Id.* p. 127. See correspondence on pp. 124, 125.

"Seeing a green light is a signal to put the helm a starboard." Capt. Curme, in Rule of the Road at Sea, p. 129.

And see Diagrams 2 and 5 at end of the book.

As Dr. Lushington says in the case of The Sylph (Swabey, 235), "I cannot conceive for what purpose the green light is put on the starboard bow of a steamer, and the red light on the port side, unless it is to be some guide to vessels at a distance, that they may govern themselves by taking those measures best calculated to avoid a collision. When you see the starboard light of a steamer it is manifest that her starboard side is towards you. If the red light is visible it is the reverse; and if you were then to starboard your helm you would throw yourself right across the course of the steamer and run great risk of collision."

See also Marsden on Collisions, p. 140.

But if it is the green light instead of the red light that is seen, then starboarding would be doing what the navigators all inculcate.

Says Judge Blatchford in the case of The Wesley Seymour (7 Ben. 546): "The brig seeing a green light on her port bow about a point, was justified in regarding such light as on a vessel which was crossing from port to starboard of the brig, therefore, if the brig was to take measures to avoid such vessel, *the proper maneuvre of the brig was to starboard* and let the other vessel pass to the starboard of the brig."

See also:

The Delaware, Holt's Rule of the Road, p. 64.
The St. Cyran *v.* The Henry, Id. p. 73.
The Lady Normanby *v.* The Dapper, Id. p. 81.

The Circuit Court did not find that the light was a *green* light, but found only that it was a light.

But, in a matter which is not covered by the findings at all, we claim that the Court should look into the evidence. Especially so when, as here, there is no conflict of evidence on the point, and where a request to find in accordance with that evidence was duly made.

This Court has declared that it is "no longer called on to weigh evidence." But this is not weighing evidence.

(*d*) Now when a vessel sees a *green* light ahead, she is not in fault for starboarding.

As Commander Colomb says (Rule of the Road at Sea, p. 107): "Instinct alone will make a man call out, "hard a starboard" if a powerful green light appears suddenly before him at sea.

And that this is correct navigation is sustained by powerful authority.

See diagram on p. 135 of Jenkins' Rule of the Road at Sea, and the instruction at foot "Where A sees B's masthead *and green light only*, but B sees A's three lights, each *vessel should starboard* her helm, or B continuing her course, A should *starboard*."

See also the following quotations from the same work:

Article II. does not apply "where a red light without a green light or a green light without a red light is seen ahead." Order in Council of July 30, 1868. (Rule of the Road, p. 44).

"Green light right ahead—starboard the helm." *Id.* p. 127. See correspondence on pp. 124, 125.

"Seeing a green light is a signal to put the helm a starboard." Capt. Curme, in Rule of the Road at Sea, p. 129.

The rule of port helm cannot apply "when a red or green light is seen ahead." *Id.* p. 208.

"So long as you keep a green light opposed to a green light * * no collision can happen between passing ships." *Id.* p. 209.

"Green to green and red to red,
Perfect safety—go ahead."

And see Diagrams 2 and 5 at end of the book.

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The St. Cyran *v.* The Henry, Id. p. 73.
The Lady Normanby *v.* The Dapper, Id. p. 81.

The Courts and the navigators therefore agree that in case of the appearance of a green light ahead of a vessel, that vessel has the right to conclude that such light is on a vessel crossing from port to starboard, and should properly starboard her own wheel. We submit that the Circuit Judge not only erred in laying down the rule of law as broadly as he did, but that the Annie Lindsley in this case was not in fault for starboarding.

(*e*) There is yet another consideration in reference to this starboarding of the brig's wheel.

The Circuit Court has found "a hail was heard from the schooner, the brig's wheel was then put to starboard" (6th finding). But the Court has not found what that hail was.

Now the evidence is uncontradicted that that hail was understood by those on the brig to be a hail calling on her to starboard her helm.

Parritt says it was "to hard up my wheel," (Fol. 14) Davis says it was to "keep off," (Fol. 15) Nicholson says it was "hard up your wheel" (Fol. 18).

This hail, addressed to the ears of the men on the brig, said the same thing to them that the green light said to their eye. The starboarding of their helm under such circumstances was the result of what Commodore Colomb speaks of as "instinct."

We submit that the law will not declare obedience to such instinct to have been negligence.

On the contrary, it is laid down in Marsden on Collisions, p. 7, that "Where a ship is hailed from another to take a particular course, and she obeys the hail, the other ship cannot be heard to say that the course was wrong, although, in fact, it caused the collision and was in violation of the regulations." And the cases of the Carolus (3 Hagg. Ad. 343, note), and The Huntress (2 Sprague 62) are cited to sustain the doctrine.

Second Point.

The Circuit Judge, having found that the vessels were meeting end on and that the brig starboarded her helm, evidently considered that the brig had violated the 16th Rule of Navigation, and was therefore in fault.

But we submit that the learned Judge overlooked the modifying effect of the then 19th (now 24th) Rule, which provides that "In obeying and construing these Rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger."

Now the appearance of a *green* light *ahead* is such a circumstance; and porting the helm when a green light so appears and thus necessarily attempting to cross the bows of the vessel which shows such green light would be a danger of navigation to which the navigators on the brig were required to pay "due regard," and a due regard for that danger would make them instinctively avoid it.

See the Delaware, Holt's Rule of the Road, p. 66.

Third Point.

There was a manifest fault on the part of the schooner as to her lookout, and this was a cause, if not the cause, of the collision.

And it was an error in the Circuit Court to refuse a finding to that effect (3d request, fol. 64–5).

(*a.*) The facts which the Court found, bearing on this question, are these:

1. The sky was overcast and there was a little rain, but no mist or fog, though it was quite dark.

2. The brig had her regulation lights set (3d finding). "Regulation lights" are lights that are visible two miles.

3. The lookout on the schooner did not see any light until after he saw the brig (5th finding), and he never saw the brig's green light at all.

(*b.*) It must be noticed that there is no finding that the lookout of the schooner was faithful and attended to his duty.

The only finding is that "*when the brig was first discovered* by those on board the schooner * * her mate was at the wheel and a competent lookout at his post on deck forward of the windlass."

(*c.*) Now this finding, as will be seen, does not in terms negative the allegation of the lookout's having been absent from his post before the brig was discovered.

Nor does it negative the allegation of his being negligent in the performance of his duty on his post, if he was not absent from it.

(*d.*) If there were no other finding of fact, perhaps the finding, as to a competent lookout at his post, would be held to amount to a finding that the schooner kept a good lookout.

But when we have also the fact found that the lights of the brig were regulation lights, which were therefore visible two miles, and yet were not seen by the lookout till the vessels were so near that he made out "the vessel and her sails," this latter finding is inconsistent with a finding that the schooner kept a good or proper lookout.

(*e.*) There is also uncontradicted evidence that the lookout was absent from his post (fol. 34) just before the brig was discovered (fol. 34.)

(*f.*) The finding that a lookout did not see a light which was burning brightly before him amounts to a finding that he did not faithfully perform his duty. The conclusion from that fact, in the absence of any other fact explaining his failure to see it, is inevitable.

The Ariadne, 13 Wall., 478.

As this Court said in the case of The Sunnyside: "Vigilance as well as experience is required of a lookout, and if he is inattentive to his duty it is no sufficient excuse to say that he was competent to perform the required service." (1 Otto, p. 219.)

And again in the case of The Colorado (Id. p. 699): "Lookouts are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect, the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel."

As Judge Taney said in the case of The Adelaide (Taney's Rep., p. 579, 580), in speaking of such a case: "I do not see how this can be accounted for, except by the want of a proper lookout. It is true that the mate was stationed, it is said, as a lookout ahead; but it is not sufficient that a person should be stationed as a lookout and be called a lookout; he must perform that duty and perform it diligently, and it is impossible to believe that a vessel like the brig, with a signal light up, could not have been seen by a vigilant lookout on board the Adelaide long before she approached within fifty yards."

See also The Amalia, Holt's Rule of the Road, p. 89.

Fourth Point.

There is an inconsistency in the findings as to the direction of the vessels' courses and their approach to each other. The Court has found (1) that "the wind was east of south—its precise direction is not satisfactorily shown;" (2) the brig was heading about east north east; (3) the brig was close hauled; (4) the schooner was heading west by south; (5) the schooner had the wind a little free; (6) the vessels were approaching each other end on or nearly end on.

(*a*) Now, from east north east to west by south is seventeen points by compass.

(*b*) The brig being close hauled would take six points of the seventeen (Parritt, fol. 14), which would bring the wind about southeast.

(*c*) That leaves eleven points for the schooner. It follows that either she had the wind not "a little free," but *six points* free, or else the schooner was not heading west by south.

See Diagram.

(*d*) If on the other hand the schooner did have the wind only "a little free," or was "hauled well down," as the Circuit Judge twice says in his opinion (fol. 73, 78), then she could not have been heading west by south.

With that wind the schooner, if close hauled, would head south by west. To have been "hauled well down," or to have the wind "a little free," she could not have been heading farther west than southwest. That would give her a wind three points free. No one would speak of a vessel which had a wind more than three points free as being "hauled well down," or "*a little* free."

(*e*) In this latter case the vessels would not be meeting end on, but the schooner would have

been doing just what her green light proclaimed to the brig that she was doing, viz., crossing the course of the brig from port to starboard.

See Diagram.

Fifth Point.

The sole fault that has been found on the part of the brig is that she starboarded her wheel.

We submit that under the circumstances of her seeing a green light ahead, and hearing a hail, which she understood to be a hail to keep off, or starboard her wheel, that starboarding of her wheel was not a fault.

(*a*) If the Court is limited to the consideration of the single question whether this conclusion of law was erroneous or not, then it would seem to follow that, that being found erroneous, there is no ground to support the decree for the libellants, and that that decree must be reversed.

(*b*) But if the Court is authorized to go farther and say for itself what decree should be rendered in the cause between the parties on the whole case, then we insist—

1. The schooner was manifestly in fault for not seeing the light of the brig, which was a regulation light.

2. Where a vessel has been proved guilty of such a fault, as not keeping a good lookout, the presumption is that such fault caused the collision, and that presumption can only be overthrown by very clear proof that that fault did not as a matter of fact contribute to the collision.

FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 97.

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Libellants and Appellees,

vs.

THE BRIG "ANNIE LINDSLEY," HER TACKLE, &c., WHEREOF CORNELIUS T. TOMPKINS IS
Claimant and Appellant.

BRIEF FOR APPELLEES.

BUTLER, STILLMAN & HUBBARD,
Proctors for Appellees.

WILLIAM ALLEN BUTLER,
Advocate.

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

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Brief for Appellees.

STATEMENT OF THE CASE.

This cause comes up on appeal from a decree made by the Circuit Court of the United States, for the Southern District of New York, affirming a decree of the District Court for the same District, and awarding to the libellants for damages and costs in a case of collision the sum of $11,261.71.

See Decree of District Court, *Record, fol.* 26.
Decree of Circuit Court, *Record, fol.* 54.

The collision out of which the action in the District Court arose, occurred on the high seas on the evening of May 7, 1869. The schooner *Sallie Smith*, owned by the libellants, was sailing up Long Island Sound, bound on a voyage from Portland to New York, laden with brown stone and iron. The sky was overcast, and there was a little rain, but no fog, and the water not rough. The wind blew a good seven knot breeze east of south, and the *Sallie Smith* was sailing under full sail, on a course a little south of west—about west by south. She had a lookout properly stationed, forward of the windlass; her mate was at the wheel; and her side lights were regularly set, and brightly burning. (*Finding of Circuit Court, fol.* 67.)

About half-past eight o'clock, the *Sallie Smith* then being about three miles northeast of Eaton's Neck Light-house, her look-out saw and reported, about ahead, a vessel, which afterwards proved to be the brigantine *Annie Lindsley*, bound east to New York from Hillsborough, New Brunswick, in ballast. She was steering by the wind and not by her compass, and was heading about east northeast. Her master was on deck, the second mate at the wheel, and one man forward. She had her starboard tacks aboard. (*Ib., fol.* 68.)

The two vessels were approaching end on or nearly end on, and on courses involving the risk of collision. The brig was close-hauled. The schooner had the wind a little free. (*Ib., fol.* 68.)

The lookout on the schooner discovered the brig about dead ahead. He saw no lights, but made out the vessel. He reported her at once to the man at the wheel, who put the wheel to port and bore off till he opened the red light of the brig. The schooner was not discovered from the brig until after the brig was discovered from the schooner. The lookout was the first to see the schooner from the brig; and he called out "light right ahead." About the same moment a hail was heard from the schooner. The brig's wheel was then put to starboard, and she swung off one point. As soon as this movement could be discovered, another hail came from the schooner to luff, and the wheel was put to port, but before it could materially effect the course of the brig, the two vessels came together, the brig striking the schooner on the port

quarter, the jib-boom of the brig passing through the main sail of the schooner. The schooner sank in a very few moments, with her cargo, and was a total loss.

Ib., fol. 69.

The owners of the schooner filed an amended libel against the brig to recover the damage sustained by them, Dec. 19, 1872 (*Libel, Record, fols.* 1–4). The owner of the brig, Cornelius T. Tompkins, as claimant, intervened and answered Dec. 24, 1872 (*Ans., Rec.* 5–7). The testimony in the District Court was taken by deposition. The master of the schooner, her first mate, the man at the wheel and the lookout being all the officers and crew except the steward, who was below, were examined on the parts of the libellants in 1871 (*Depositions, Rec., fols.* 8–13). On the part of the claimant the master of the brig, the lookout and the man at the wheel were examined in 1869 and 1871 (*Depositions, Rec., fols.* 13–21).

The cause was heard at the District Court before Mr. Justice BLATCHFORD, January 11, 1873 (*Rec., fol.* 8), on the pleadings and the depositions.

The decision of the District Judge was afterwards rendered, holding the brig in fault for the collision and directing a decree for the libellants and a reference to a commissioner to ascertain the amount of their damages (*Rec., fol.* 22).

The learned District Judge held that the two vessels were shown by the evidence to have been in such a position before the collision, that they were meeting end on, or nearly end on, so as to involve risk of collision; that the schooner properly ported, as required by Article 12; that it was the duty of the brig to port, but, on the contrary, she starboarded, and that there was fault in the brig in starboarding, which contributed to the collision; also, that the brig being close hauled, and having the wind on her starboard side, should have kept her course, instead of starboarding.

See opinion of BLATCHFORD, *J.*, 6 Benedict, 290.

The libellant's damages were assessed by the Commissioner, and his report of the same confirmed and a decree entered thereon, March 29, 1875 (*Rec., fols.* 23–27).

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See opinion of BLATCHFORD, *J.*, 6 Benedict, 290.

The libellant's damages were assessed by the Commissioner, and his report of the same confirmed and a decree entered thereon, March 29, 1875 (*Rec., fols.* 23–27).

Appeal was taken by the claimant to the U. S. Circuit Court for the Southern District of New York, and pending the appeal, and in the years 1877 and 1878, some *nine years after the collision*, and more than four years after the decision by the District Court, all the witnesses on the part of the claimant were re-examined in reference to the facts of the collision, and sought to avoid the effect of that decision by further evidence and new statements of the occurrence.

Depositions of Parritt, Nicholson and Davis, in U. S. Circuit Court. Rec., fols. 31–50.

The cause came on to be heard in the Circuit Court, June 11, 1878, before his Honor Chief Justice WAITE, sitting at Circuit (*Rec., fols*, 53, 54). The court found the facts and conclusions of law set forth in the Record, on pages 32, 33, *fols.* 66–70, and affirmed the decree of the District Court, and a decree pursuant to such findings and decision was entered September 4, 1878 (*Decree of Circuit Court, Rec., fols.* 54–56.)

The learned Chief Justice held that the testimony taken by the claimants since the appeal to the Circuit Court was contradictory of the evidence originally given by the same witnesses, and could not be reconciled therewith; that the case made in the Circuit Court was substantially the same as that appeared below; that from the testimony the vessels were approaching each other end on or nearly end on, the brig being close-hauled and the schooner sailing with the wind to some extent free, and having the wind on her port side; that under these circumstances the rules either required the two vessels to port and pass each other on the port side, or the brig to keep her course and the shooner to keep out of the way; that in any view of the case the brig was in fault in starboarding, and was chargeable with all the damages resulting from the collision.

See opinion of Chief Justice WAITE, *Rec., fols.* 70–81.

The claimant excepted to the findings of the Circuit Court, and appealed to this court, September 12, 1878. *Petition of appeal, Rec., fols.* 89–93.

POINTS.

First Point.—Upon this appeal the findings of fact in the Circuit Court are conclusive, and have all the effect of the verdict of a jury in actions at law.

The only material question in the court below was, whether upon the evidence, which was conflicting, the brig was in fault in the particulars found by the Circuit Court and specified in the findings (*Rec., fols.* 66-69). None of the exceptions taken by the bill of exceptions relate to any question which can be considered on this appeal, the findings of fact being conclusive, and the concluons of law being the necessary result of those findings.

The Abbotsford, 98 U. S., 440.
The Benefactor, 102 U. S., 214, *p.* 218.

Second Point.—No brief having been filed by the appellant up to this date, November 14, 1881, the counsel for the appellees are not advised of any ground upon which error can be assigned in favor of the appellant in this court.

The questions presented in the court below having been purely questions of fact, and this court having repeatedly held that under the existing act of May 1, 1875 (18 Stats. at L. 315), the findings of facts below are conclusive, it would seem out of place to extend this brief by any further discussion of the facts. If, however, the court shall look behind the findings, they will perceive that they are abundantly sustained by the evidence:

1st. The evidence established beyond controversy, as found by both the Circuit and the District Courts, that the two vessels were approaching each other end on, or nearly end on. According to the testimony on the part of the brig there was only a variation of one point between them. The course of the schooner was W. by S. (*See Answer of the Brig, Rec., fol.* 6). The course of the brig was about E. N. E. (*Nicholson, Rec., fol.* 18). The light of the brig bore

4th. The undisputed evidence having established the relative positions and courses of the vessels to be such that in any view the brig was at fault in starboarding her helm, it is unnecessary to consider the conflicting evidence as to other points. This has been weighed in the court below, and disposed of upon just grounds. The clear weight of the evidence justified the conclusions of the court.

Third Point.—The decree of the Circuit Court should be affirmed with costs.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants and Appellees.

WILLIAM ALLEN BUTLER,
Advocate.

William Allen Butler.

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

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DANIEL BROWN ET AL.,
Libellants and Appellees.

No. 97.

Supplement to Brief for Appellees.

The appellant's brief, a copy of which was delivered to appellees' counsel, after his brief had been prepared, contains statements of fact and propositions of law which require notice and a few further suggestions on behalf of the appellees.

First.—The appellant's counsel claims error in the conclusion of law, that the brig was in fault for starboarding her wheel, as amounting to "laying down this rule, viz.: That a "vessel close hauled on the starboard tack, seeing a light right "ahead, is in fault if she starboards."

And he claims that whether a vessel is in fault for starboarding on seeing a light ahead depends on what the light is, and if it is a green light, as testified to by the witnesses on the *Annie Lindsley*, it is the duty of the vessel to starboard.

And to support the proposition thus advanced, he asks this court to look into the evidence and find that the light seen from the *Annie Lindsley* was the green light of the schooner.

The plain answer is that the evidence does not justify such a finding, and both the District Judge and the Chief Justice of this court, sitting at Circuit, refused to accept the story of the brig as to the green light being seen, as testified to by claimant's witnesses.

The learned Chief Justice expressly refused to find this fact (*Rec., fol.* 61 ; *Exceptions* 14, 15, *fol.* 84).

The brig's witnesses testified that when the attention of her lookout and officers were attracted to the *Sallie Smith* by her hails, they saw her green light about a point on the lee or *port* bow of the brig (*Nicholson, fol.* 18; *Davis,* 15). This could not have been.

The *Sallie Smith's* course was west-by-south, and her green light could not have been seen over the port bow of the brig, unless the brig's course had been east or south of east.

But the brig's testimony is full that her course was east-northeast, and such is the finding of the justice sitting in the Circuit Court. It follows inevitably that either the brig's course was not east-northeast, or else that she did not see the green light, *but the red light* of the *Sallie Smith* over her port bow, and then the position of the vessels would have been red to red—a position of perfect safety, if the brig had ported instead of starboarding.

The whole assumption in the appellant's first point is that the discredited statements of the witnesses in the courts below, as to the green light alone of the schooner having been seen, are now to be adopted as true by the Appellate Court, in the face of the refusal of the Circuit Court to accept them, or to find the fact which they sought to prove.

Parritt, on his second examination, endeavored to show that the schooner was always on the starboard bow of the brig, while in the answer it was averred that the green light was

first seen on the lee bow of the brig. (*Compare answer, Rec., fol.* 7, *Deposition of Parritt, Rec., fol.* 32.)

A witness guilty of such contradictions was justly discredited.

Second.—The second point in the appellant's brief is answered in our main brief and in the full consideration given to the effect of the rules of navigation therein referred to.

But certainly there were no "special circumstances" attending this collision to relieve those in charge of the *Annie Lindsley* from the requirements of the 16th Rule. The course of each vessel could be readily determined from the other *without assistance from the lights.* The lookout of the *Sallie Smith* saw the ~~beam~~ loom of the *Annie Lindsley* before seeing her light, and saw that she was about dead ahead, coming from an *opposite direction* (*Read, fol.* 8; *Fifth Finding of Fact, fol.* 68). If the lookout of the *Sallie Smith* could so determine the position and course of the *Annie Lindsley*, the lookout of the *Annie Lindsley* should have seen as much of the *Sallie Smith*, for the vessels were then nearer together (*Sixth Finding of Fact, fol.* 68)

Moreover Capt. Parritt saw the schooner's course N by W. by S. when he first saw her light (fol 14)

Third.—The third point of the appellant seems to rest mainly on a verbal criticism of the findings below, by which it is sought to raise the question that the finding that when the brig was first discovered by the schooner there was a competent lookout at his post on deck, forward of the windlass, is not inconsistent with the fact now claimed, that the lookout was not faithful in the performance of his duty, and was absent from his post before the brig was discovered.

But the refusal to find these very facts now claimed (*see claimant's proposed findings* 6, 7 *and* 8, *exceptions* 15, 16, 17) sufficiently negative propositions now advanced, and there is nothing in the evidence on which to base the allegations of fact contained in appellant's third point.

Fourth.—There is no inconsistency in the findings as to the direction of the vessels' courses as charged in appellant's fourth point. The evidence was conflicting on the subjects embraced in this point. The libel alleges the wind was S. half W. The answer about S. E. Read, the schooner's look-out says it was S. by W. Logan, the wheelsman, says it was S. Parritt, master of the brig, says the wind was S. E. Nicholson, at the wheel of the brig, says it was E. S. E. to S. E.

The appellant's effort now is to show that the schooner had the wind six points free or else she was not heading W. by S. And that, therefore, the vessels were not meeting end on, or nearly so.

But where testimony is in conflict, as so often happens, in respect to the exact course of the wind, or of the vessels affected by it, the undisputed evidence as to actual occurrences as to the vessels themselves must control, and the testimony is clear and uncontradicted, both from the schooner and the brig, that the vessels, when discovered, respectively, each from the deck of the other, were approaching on intersecting courses, diverging not more than one point, and were therefore clearly end on, or nearly so.

It is idle to endeavor to destroy the effect of positive testimony by captious criticisms as to the modes of expression adopted by the court, or by a theory as to the precise direction of the wind in respect to which there was conflict of evidence by the witnesses.

Fifth.—Appellant's fifth point, so far as it relates to the starboarding of the brig's helm, seems to repeat the observations on page 8 under the first point.

The master of the brig having in his final testimony fully admitted that it was wrong to starboard (*Rec., fol.* 35); the attempt to excuse, in doing so, at this late stage of the case, seems out of place, and the further claim that this court should make new findings of fact, and hold the schooner in fault for want of a sufficient look-out, in the face of the re-

fusal of the court below so to find, is, we respectfully submit, outside of the proper province of the court under its own adjudications, and would be wholly unwarranted by anything appearing on the record.

BUTLER, STILLMAN & HUBBARD,
Proctors for Appellees.

WM. ALLEN BUTLER,
Advocate.

Wm. Allen Butler. Syracuse.

14-192

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~324.~~ 78

THE MAHONEY MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ANGLO-CALIFORNIAN BANK (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 31, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 324.

THE MAHONEY MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ANGLO-CALIFORNIAN BANK (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States of the ninth judicial circuit within and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Mahoney Mining Company, plaintiff in error, and The Anglo-Californian Bank (limited), defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the fourth Monday of October next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid be' inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d.

The above writ of error is hereby allowed.

(S'g'd) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States of America.

Attest, &c.:
L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D'p'y Clk.*

(Indorsed:) United States Supreme Court. The Mahoney Mining Co., pl'ff in error, vs. The Anglo-Californian Bank (limited), def't in error. Writ of error. Copy of writ of error lodged in the clerk's office of the U. S. circuit for California, for the within-named defendant in error. Stewart, Vanclief & Herrin, attorneys for plaintiff in error.

b The answer of the judges of the circuit court of the United States of the ninth judicial circuit, within and for the district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:
[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep'y Clk.*

c UNITED STATES OF AMERICA, *ss:*

To the Anglo-Californian Bank (limited), defendant in error, greeting:

You are hereby cited and admonished to be and appear at the Su-

preme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the fourth Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein The Mahoney Mining Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

October 4, 1878.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States of America.

(Indorsed:) 1837. U. S. Supreme Court. The Mahoney Mining Company, pl'ff in error, v. The Anglo-Californian Bank (limited), def't in error. Orig. Citation. Filed October 7th, A. D. 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

d UNITED STATES MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within citation the 4th day of October, 1878, and personally served the same on the 7th day of October, 1878, by delivering to and leaving with Wm. H. Sharp, att'y for defendant in error mentioned in this writ, a certified copy thereof, at the city & county of San Francisco, in this district.

A. W. POOLE,
U. S. Marshal,
By D. W. C. STORY,
Deputy.

1 *Complaint.*

In the district court of the third judicial district of the State of California in and for the city and county of San Francisco.

THE ANGLO-CALIFORNIA BANK (LIMITED),
vs.
THE MAHONEY MINING COMPANY.

Plaintiff, for cause of action against defendant, alleges:

That plaintiff is a corporation duly incorporated, organized and existing under the laws of the Kingdom of Great Britain;

That defendant is a corporation duly organized and existing under the laws of the State of California;

That on the 26th day of June, 1877, defendant was, and now is, indebted to plaintiff in the sum of $6,351.72 gold coin on an ac-
2 count for money lent by said plaintiff to defendant, and for money paid, laid out, and expended by plaintiff to and for the use of said defendant, and at its request;

That there is now due and owing from defendant to plaintiff the sum of $6,351.72, gold coin.

And for a further and separate cause of action herein, plaintiff alleges:

That on the 21st day of June, 1877, defendant was indebted to plaintiff in the sum of $6,351.72, gold coin, upon an account stated between them, and on that day, in consideration of being so indebted, and to secure further advances, made its certain promissory note in writing, in the words and figures following:

$7,500.] SAN FRANCISCO, *June 21st*, 1877.

One day after date, without grace, for value received in United States coin, we promise to pay to the order of The Anglo-California Bank (limited) the sum of seven thousand five hundred dollars, with interest thereon at the rate of one and a half per cent. per month until paid—both principal and interest payable in the like gold coin.

3

MAHONEY MINING COMPANY,
[SEAL.] By F. A. BENJAMIN, *President.*
By LOUIS KOPLAN, *Sec'ty.*

And then and there delivered said note to plaintiff.

That, after deducting all just offsets on said note, there now remains due and owing, from defendant to plaintiff, the sum of $6,351.72, gold coin, with interest thereon at the rate of one and a half per cent. per month from 21st June, 1877, until paid.

Wherefore, plaintiff demands judgment against defendant for the sum of $6,351.72, gold coin, with interest thereon in like coin at the rate of one and a half per cent. per month from June 21st, 1877, until paid, and costs of suit.

HART & RISING,
Att'ys for Plaintiff.

4 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

F. F. Low, being first duly sworn, says that he is manager of the above and foregoing named corporation plaintiff; that he has heard read the within above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief; and, as to those matters, he believes it to be true.

F. F. LOW.

Sworn and subscribed to before me this 31st day of July, 1877.
[SEAL.] F. O. WEGENER,
Notary Public.

(Endorsed:) Filed 3d August, 1877. Thos. H. Reynolds, clerk, by Thomas Macauly, dep. cl'k.

5 *Demurrer.*

Third district court, State of California, city and county of San Francisco.

THE ANGLO CALIFORNIAN BANK (LIMITED) }
vs. }
THE MAHONEY MINING COMPANY. }

The defendant in the above-entitled action demurs to the complaint herein upon the following grounds: That said complainant does not state facts sufficient to constitute a cause of action.

STEWART, VANCLIEF & HERRIN,
Attorneys for Defendant.

(Endorsed:) Service of within demurrer admitted this 14th day of Aug., A. D. 1877.

GEO. F. & WM. H. SHARP,
Attorneys for Plaintiff.

Filed Aug. 15, A. D. 1877.

THOS. H. REYNOLDS, *Clerk*,
By COLIN M. BOYD, *Dep'y Clerk.*

6 *Answer.*

In the district court of the third judicial district, State of California, in and for the city and county of San Francisco.

THE ANGLO-CALIFORNIA BANK (LIMITED), plaintiff,
vs.
THE MAHONEY MINING COMPANY, DEFENDANT.

For answer to the complaint of the plaintiff in the above-entitled action, the said defendant herein makes the following denials and allegations:

I. On and according to its information and belief said defendant denies that on the 20th day of June, 1877, or at any other time, the defendant was, or now is, indebted to the plaintiff in the sum of six
7 thousand three hundred fifty-one and seventy-two hundredths ($6,351$\frac{72}{100}$) dollars, or any other sum, in gold coin, or any other kind of currency, on account, for money lent by plaintiff to the defendant, or for money paid, laid out, or expended by plaintiff to or for the use of the defendant, at its request or otherwise; and on like information and belief denies that plaintiff ever lent to the defendant, or paid, laid out, or expended to or for the use of the defendant, or at its request, any sum of money.

II. According to its information and belief the defendant further denies that on the 21st day of June, 1877, or at any other time, the defendant was indebted to the plaintiff in the sum of six thousand three hundred fifty-one and seventy-two hundredths ($6,351.72) dollars, or any other sum, in gold coin or other currency, upon an account stated between plaintiff and defendant, and further denies that any account was ever stated between plaintiff and defendant.

8 III. According to its information and belief the defendant further denies that on the 21st day of June, 1877, or at any other time, the defendant made or delivered to the plaintiff the promissory note, a copy of which is set out in said complaint, or any promissory note, or that the defendant is indebted to the plaintiff on such or any promissory note in any sum of money whatever.

IV. For a further and distinct answer to the complaint of the plaintiff in the above-entitled action the defendant alleges the following facts:

1st. That in the month of December, 1873, the plaintiff herein was, by resolution of the board of trustees of the defendant corporation, appointed to the office of treasurer of the defendant corporation, and then accepted said office, with all the trusts and obligations belonging
9 or incidental thereto, and continued to hold said office, and to act as such treasurer from the time of said appointment until the 22d day of June, 1877.

2nd. That at the time the plaintiff was so appointed treasurer of the defendant, and during all the time the plaintiff held said office and acted as such treasurer, one Ignatz Steinhart was a trustee of the defendant, and from the time of said appointment until the first day of May, 1877, said Steinhart was the president and managing agent of the defendant.

3d. That from the time of the said appointment of the plaintiff to the office of treasurer of the defendant until the 22d day of June, 1877, said Steinhart was managing agent of the plaintiff corporation; and, as this defendant is informed and believes, was largely interested as a stockholder therein, but was never interested in the defendant corpora-

tion, except that he was the nominal holder of ten of the twelve
10 thousand shares of the capital stock thereof, merely as a qualification for the office of trustee.

4th. That between the first day of January, 1874, and the 22 day of June, 1877, and whilst the plaintiff assumed to act and did act as treasurer of the defendant, it received as such treasurer at different times large sums of money, the property of the defendant, amounting, according to the information and belief of the defendant, to the sum of forty-three thousand (43,000) dollars in gold coin of the United States, for which it has never accounted to the defendant.

5th. That defendant is informed and believes, and according to such information and belief alleges that, during the time that said Steinhart acted as managing agent and trustee of the defendant, and as managing agent of the plaintiff as aforesaid, he managed the business of the defendant for the benefit and interest of the plaintiff and
11 of J. & W. Seligman & Co., who were the owners of about five thousand shares of the capital stock of the defendant, and of a large portion of the capital stock of the plaintiff corporation, regardless of the interest of the stockholders of the defendant other than the said J. & W. Seligman & Co.

6th. That on the 16th day of April, 1877, there were five trustees of the defendant corporation, viz, J. D. Fry, L. Jacobi, S. Heydenfeldt, Ignatz Steinhart, and Wm. M. Stewart, and on that day the said Steinhart, Fry, and Heydenfeldt, in the absence of said Stewart and Jacobi, wrongfully convened as a board of trustees of the defendant without any previous notice to said Stewart and Jacobi of such meeting; and at said meeting wrongfully, and without authority of law, called a meeting of the stockholders of the defendant to meet on the first
12 day of May, 1877, for the purpose of electing a board of trustees of the defendant corporation; and, in pursuance of said call, a meeting of the said stockholders, representing less than one-half of the capital stock of the defendant, was held on said first day of May, 1877. At said meeting the said J. & W. Seligman & Co. was represented by said Steinhart, Heydenfeldt, and one F. H. Benjamin, who, for the fraudulent purpose of making it appear that a majority of the stock was represented at said meeting wrongfully and without any authority, caused to be issued to and represented by one Hyman Bush, one thousand shares of said stock, then the property of William Sharon, Thos. Bell, and Flood & O'Brien, which last-mentioned 1,000 shares of stock were wrongfully voted at said meeting without any authority from said owners thereof. That the result of said meeting was the election
13 of Ignatz Steinhart, S. Heydenfeldt, F. H. Benjamin, P. N. Lilienthal, and Otto Esche, as trustees of defendant.

7th. That on the 9th day of June, 1877, Wm. M. Stewart, S. D. R. Stewart, Wm. F. Herrin, Geo. C. Gorham, jr., and W. W. Foote, commenced an action in the district court of the 19th judicial district of the State of California in and for the city and county of San Francisco, against the said Steinhart, Heydenfeldt, Lilienthal, Benjamin, Esche, and this defendant, for the purpose of having the said unauthorized election declared void and set aside by said court, and for the further purpose of ordering a new election of trustees for defendant. That in this last-mentioned action such proceedings were regularly had; that, on the 21st day of June, 1877, at 11 o'clock a. m., said last-mentioned court ordered, adjudged, and decreed that said meeting of stock-
14 holders, held on the 21st day of May, 1877, as aforesaid, was illegal, invalid, and void; that neither said Steinhart, Heydenfeldt,

Lilienthal, Esche, nor Benjamin was entitled to the office of trustee of the defendant by virtue of said election, and that a meeting of the stockholders of the defendant for the purpose of electing its trustees should be held on the 22d day of June, 1877, pursuant to a call and notice previously made and published according to law.

8th. That after said judgment and decree was pronounced and rendered by said last-mentioned court, and after the said defendants in said last-mentioned action and the plaintiff herein had notice thereof, the said Steinhart, Benjamin, and Heydenfeldt caused to be drawn, signed and delivered the alleged promissory note set out in the plaintiff's complaint herein; and according to its information and belief, the defend-
15 ant alleges that there was no consideration for said promissory note, and that it was drawn, signed, and delivered by said Steinhart, Benjamin, and Heydenfeldt for the purpose of cheating and defrauding the stockholders of the defendant other than the said J. & W. Seligman & Co.

9th. That according to its information and belief, the defendant further alleges that through the management of said Steinhart the plaintiff herein has wrongfully expended and converted to its own use large portions of the money of the defendant received by it as treasurer of the defendant as aforesaid. That it wrongfully paid from said money of the defendant a demand of said Heydenfeldt against said J. & W. Seligman & Co., amounting to two thousand five hundred ($2,500), and also applied large sums of defendant's money to the payment of interest, falsely and wrongfully claimed to be due from the defendant
16 to the plaintiff, and that it has paid from said money a large number of checks in sums not known to the defendant, drawn without authority from the defendant and for purposes foreign to the business of, and not properly chargeable to, the defendant; all of which it, the plaintiff, had notice.

10th. Defendant further alleges that in pursuance of said judgment and decree of said district court of the 19th judicial district, a meeting of the stockholders of the defendant for the purpose of electing trustees was duly held on the 22d day of June, 1877. At which meeting, Wm. M. Stewart, S. D. R. Stewart, Wm. F. Herrin, Geo. C. Gorham, jr., and W. W. Foote, were duly elected trustees of the defendant, and ever since have been and still are the lawful and only trustees of the defendant.

11th. Defendant further alleges upon its information and belief that upon a fair and honest accounting the plaintiff will be found to
17 be indebted to the defendant in a considerable sum of money, for money had and received by the plaintiff as treasurer of defendant as aforesaid.

The defendant therefore prays that an accounting between the plaintiff and defendant may be had, and that the defendant may have judgment against the plaintiff for such sum as may be found due the defendant upon such accounting.

STEWART, VANCLIEF & HERRIN,
Attorneys for Defendants.

STATE OF CALIFORNIA,
City & County of San Francisco, ss:

George C. Gorham, jr., being first duly sworn, deposes and says that he is an officer, to wit, the secretary, of the Mahoney Mining Company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is
18 true of his own knowledge, except as to the matters which are

therein stated on information or belief, and as to those matters that he believes it to be true.

GEORGE C. GORHAM, JR.

Subscribed and sworn to before me this 16th day of August, A. D. 1877.

[SEAL.] HOLLAND SMITH,
Notary Public.

(Endorsed:)

Service of within answer admitted this 16th day of August, A. D 1877.

G. F. & W. H. SHARP,
Attorneys for Plaintiffs.

Filed Aug. 16, A. D. 1877.

THOS. H. REYNOLDS, *Clerk*,
By COLIN M. BOYD, *Dep. Clk.*

19 *Notice.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco.

THE ANGLO CALIFORNIA BANK (LIMITED), plaintiff, *vs.* THE MAHONEY MINING COMPANY, DEFENDANT. } Notice

To Messrs. HUNT & RISING and G. F. & W. H. SHARP,
Attorneys for Plaintiff:

You will take notice that the defendant in the above-entitled suit this day made and filed in the above court its petition for the removal of said suit into the circuit court of the United States, in and for the
20 district of California, and also made and filed therewith a bond with good and sufficient surety for its entering in said circuit court on the first day of its next session a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

City and county of San Francisco, August 18th, 1877.

Yours, &c.,

STEWART, VANCLIEF & HERRIN,
Attorneys for Defendant.

(Endorsed:)

Service of within notice admitted this 15th day of August, A. D. 1877.

HUNT & RISING,
Attorneys for Plaintiff.

Filed Aug't 18th, 1877.

THOS. H. REYNOLDS, *Clerk*,
By COLIN M. BOYD, *Dep'y Clerk.*

21 *Petition for removal of cause.*

In the district court of the third judicial district of the State of California, in and for the city and county of California.

THE ANGLO CALIFORNIAN BANK (LIMITED), plaintiff,
vs.
THE MAHONEY MINING COMPANY, DEFENDANT.

Petition for removal to the circuit court of the United States, district of California.

To the honorable the above-named district court:

Your petitioner, The Mahoney Mining Company, the defendant herein, respectfully shows to this honorable court:

That the above-entitled suit is a suit of a civil nature at law, brought and now pending in the said district court of the State of California.

22 That the matter and amount in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between a citizen of a State and a foreign subject.

That the Anglo Californian Bank (limited), the above-named plaintiff, was, at the time of the commencement of this suit, and still is, a corporation incorporated, organized, and existing under the laws of the Kingdom of Great Britain, as your petitioner states upon information and belief, and that said plaintiff, by reason of having incorporated and organized as aforesaid, is and was at the time of the commencement of said suit, a subject of the said Kingdom of Great Britain.

That your petitioner was, at the time of the commencement of said suit, and still is a corporation incorporated, organized and existing under the laws of the State of California, and that said petitioner, by

23 reason of having been incorporated and organized as aforesaid, was, at the time of the commencement of said suit, and still is, a citizen of the said State of California.

That said suit has not been tried, and that the same is pending for trial, and that the term of said district court of the State of California, at which said cause could be first tried, is the next August term of said court, appointed by law to be held on the third Monday of August, A. D. 1877, at the city and county of San Francisco, in said State of California, and that your petitioner desires to remove said suit before the trial thereof into the circuit court of the United States to be held in the district where such suit is pending, to wit, the circuit court of the United States in and for the district of California, in pursuance of the provisions of law as contained in the act of Congress approved March 3d, A. D. 1875, entitled "An act to determine the jurisdiction of circuit

24 courts of the United States, and regulate the removal of causes from State courts, and for other purposes."

And your petitioner offers and files herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and shall do all such other acts and things as by the said act of Congress, approved March 3rd, A. D. 1875, are required

to be done upon the removal of a suit into the circuit court of the United States.

And your petitioner prays this honorable court to accept this petition and said bond, and to proceed no further herein, and that said suit may be removed into the said circuit court of the United States, pur-
25 suant to said act of Congress in such cases made and provided.

And your petitioner will ever pray.

THE MAHONEY MINING COMPANY,
Petitioner,
By WM. M. STEWART,
President.

Attest:
[SEAL.] GEO. C. GORHAM, JR.,
Secretary.

STEWART, VANCLIEF & HERRIN,
Attorneys for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George C. Gorham, jr., being first duly sworn, deposes and says that he is an officer, to wit, the secretary of the Mahoney Mining Company, the defendant in the above-entitled action, and the petitioner in the foregoing petition named; that affiant has read the foregoing petition; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief; and as to
26 those matters, that he believes it to be true.

GEO. C. GORHAM, JR.

Subscribed and sworn to before me this 18 day of August, A. D. 1877.
[SEAL.] HOLLAND SMITH,
Notary Public.

(Endorsed:) Filed Aug. 18, A. D. 1877. Thos. H. Reynolds, clerk, by Colin M. Boyd, dep'y cl'k.

27 *Bond on removal of cause.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco.

THE ANGLO CALIFORNIAN BANK (LIMITED), plaintiff, *vs.* THE MAHONEY MINING COMPANY, DEFENDANT. } Bond on removal of cause.

Know all men by these presents that the Mahoney Mining Company, as principal, and S. D. R. Stewart and R. E. Brewster, as sureties, are held and firmly bound unto the Anglo Californian Bank, limited, in the penal sum of one thousand dollars, the payment whereof well and truly to be made unto the Anglo Californian Bank, limited, its success-
28 ors and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally by these presents.

The above obligation is made and entered into upon these conditions: The said Mahoney Mining Company is about to make and file a petition in the above-entitled suit in the above-named State court for the removal of said suit into the circuit court of the United States in and for the district of California.

Now, if the said Mahoney Mining Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do all other acts and things as by the act of Congress, approved March 3d, A. D. 1875, entitled
29 "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," are required to be done upon the removal of a suit into the circuit court of the United States, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this eighteenth day of August, A. D. 1877.

S. D. R. STEWART. [SEAL.]
R. E. BREWSTER. [SEAL.]
THE MAHONEY MINING COMPANY,
By WM. M. STEWART, *President.*

Attest:
[SEAL.] GEO. C. GORAAM, JR.,
Secretary.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

S. D. R. Stewart and R. E. Brewster, the persons named in and
30 who subscribed and executed the foregoing bond, being each duly sworn, each for himself deposes and says that he is worth the amount specified in the said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

S. D. R. STEWART.
R. E. BREWSTER.

Subscribed and sworn to before me this 18th day of August, A. D. 1877.

[SEAL.] HOLLAND SMITH,
Notary Public.

(Endorsed:) Filed Aug't 18, A. D. 1877. Thos. H. Reynolds, clerk; by Colin M. Boyd, dep'y cl'k.

31 *Notice of order removing suit.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco.

THE ANGLO CALIFORNIA BANK (LIMITED), plaintiff, *vs.* THE MAHONEY MINING COMPANY, DEFENDANT. } Notice of order removing suit.

To Messrs. G. F. & W. H. SHARP, and Messrs. HUNT & RISING,
Attorneys for Plaintiff:

You will take notice that the above named court, this day, made and entered an order in the above entitled suit, accepting the petition and bond of the defendant heretofore filed herein, for the removal of said suit to the circuit court of the United States of the ninth circuit,

32 in and for the district of California, and ordering that said suit be removed to said circuit court, and that this court proceed no further in said suit.

City and county of San Francisco, September 21st, 1877.

STEWART, VANCLIEF & HERRIN,
Attorneys for Defendant.

I, Thos. H. Reynolds, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the third district court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original notice of order removing suit in the above entitled cause, filed in my office on the 21st day of Sept., A. D. 1877.

Attest my hand and seal of said court, this 2nd day of October, A. D. 1877.

[SEAL.] THOS. H. REYNOLDS, *Clerk*,
By BERT McNULTY, *Deputy Clerk.*

33 (Endorsed:)

Service of within notice admitted this 21st day of Sept., A. D. 1877.

G. F. & WM. H. SHARP &
HUNT & RISING,
Attorneys for Plaintiff.

Filed *Sept.* 21st day of Sept., A. D. 1877.

THOS. H. REYNOLDS, *Clerk*,
By M. A. WILSON, *Dep'y Clerk.*

34 *Order submitting demurrer.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco. August term.

Present, Hon. S. B. McKee, judge.

THE ANGLO CALIFORNIA BANK, PLAINTIFF,
vs.
MAHONEY MINING COMPANY, DEFENDANT.

FRIDAY, *September* 14*th*, 1877.

Ordered, that the demurrer to the complaint herein be and the same is hereby submitted to the court for consideration and decision without argument.

35 *Order overruling demurrer.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco, August term.

Present, Hon. S. B. McKee, judge.

THE ANGLO CALIFORNIA BANK, PLAINTIFF,
vs.
THE MAHONEY MINING COMPANY, DEFENDANT.

SEPT. 21, 1877.

Ordered, that the demurrer to the complaint herein, heretofore sub-

mitted to the court for consideration and decision, be, and the same is hereby, overruled, with leave to the defendant to answer within ten days from service of notice of overruling said demurrer.

36 *Summons.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco.

THE ANGLO CALIFORNIA BANK (LIMITED), plaintiff,
vs.
THE MAHONEY MINING COMPANY, DEFENDANT.

Action brought in the district court of the third judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to The Mahoney Mining Company, defendant.

You are hereby required to appear in an action brought against you by the above named plaintiff in the district court of the third
37 judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover in gold coin of the United States the sum of $6,351.72, with interest thereon at the rate of 1½ per cent. per month from June 21, 1877, alleged to be due plaintiff from defendant upon a certain promissory note made by defendant payable to the order of plaintiff, and upon an account for money paid, laid out and expended by plaintiff at defendant's request, as particularly set out in the complaint herein, to which reference is hereby made; also for costs of suit.

38 And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of $6,351.72 in United States gold coin, with interest as aforesaid and costs of suit.

Given under my hand and seal of the district court of the third judicial district of the State of California, in and for the city and county of San Francisco, this 3d day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] THOS. H. REYNOLDS, *Clerk*,
By COLIN M. BOYD,
Deputy Clerk.

(Endorsed:) Filed Sept. 27th, 1877. Thos. H. Reynolds, clerk, by Bert McNulty, deputy clerk.

39 I, Thos. H. Reynolds, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the third

district court in and for said city and county, hereby certify the foregoing be a full, true and correct copy of the original summons in the above entitled cause, filed in my office on the 27th day of Sept., A. D. 1877.

Attest my hand and seal of said court this 2d day of October, A. D. 1877.

[SEAL.]

THOS. H. REYNOLDS, *Clerk*,
By BERT McNULTY,
Deputy Clerk.

40 *Order removing cause.*

In the district court of the third judicial district of the State of California, in and for the city and county of San Francisco. August term.

Present, Hon. S. B. McKee, judge.

THE ANGLO CALIFORNIA BANK (LIMITED), plaintiff, *vs.* THE MAHONEY MINING COMPANY, defendant. } 6177.

SEPTEMBER 21, 1877.

It appearing to this court that the defendant herein has duly filed his petition and bond for the removal of the above entitled suit to the circuit court of the United States of the ninth circuit, in and for the
41 district of California, now, on motion of Messrs. Stewart, Vanclief and Herrin, attorneys for the defendant, it is ordered that the said petition and bond be, and the same are hereby, accepted by this court, and that the said suit be and is hereby removed to the said circuit court for trial and adjudication.

I hereby certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said 3d district court in the above entitled cause.

Attest my hand and the seal of said district court this 4 day of Oct., 1877.

THOS. H. REYNOLDS, *Clerk*,
By THOS. MACAULY,
Deputy Clerk.

42 *Certificate of clerk to the record from State court.*

I, Thomas H. Reynolds, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the district court of the third judicial district of said State, in and for said city and county, hereby certify the foregoing to be a full, true and correct copy of the record, and of all papers filed in the foregoing and above entitled suit.

Attest my hand and seal of said court this 22d day of October, A. D. 1877.

[SEAL.]

THOS. H. REYNOLDS, *Clerk*,
By COLIN M. BOYD,
Deputy Clerk.

(Endorsed:) United States circuit court, district of California, ninth circuit. Record and papers in the cause from State court. Filed 26 November, 1877. L. S. B. Sawyer, clerk.

43 *Amended answer.*

In the circuit court of the United States, district of California.

THE ANGLO CALIFORNIA BANK (LIMITED), plaintiff, *vs.* THE MAHONEY MINING COMPANY, DEFENDANT. } Amended answer.

For its amended answer to the complaint of the plaintiff in the above entitled action, the said defendant therein makes the following denials and allegations:

I. On and according to its information and belief, said defendant denies that on the 26th day of June, 1877, or at any other time, the defendant was or now is indebted to the plaintiff in the sum of six
44 thousand three hundred fifty-one and seventy-two hundredths dollars ($6,351\frac{72}{100}$) or any other sum, in gold coin or any other kind of currency, on account, for money lent by the plaintiff to the defendant, or for money paid, laid out, or expended by plaintiff, to or for the use of the defendant, at its request or otherwise, and on like information and belief, denies that plaintiff ever lent to the defendant, or paid, laid out or expended, to or for the use of the defendant, or at its request, any sum of money.

II. According to its information and belief, the defendant further denies that on the 21st day of June, 1877, or at any other time, the defendant was indebted to the plaintiff in the sum of six thousand three hundred fifty-one and seventy-two hundredths dollars ($6,351\frac{72}{100}$), or any other sum, in gold coin or other currency, upon an account stated between plaintiff and defendant, and further denies that any
45 account was ever stated between plaintiff and defendant.

III. According to its information and belief, the defendant further denies that on the 31st day of June, 1877, or at any other time, the defendant made or delivered to the plaintiff the promissory note, a copy of which is set out in said complaint, or any promissory note, or that the defendant is indebted to the plaintiff on such or any promissory note in any sum of money whatever.

IV. For a further and distinct answer to the complaint of the plaintiff in the above entitled action, the defendant therein alleges the following facts:

1st. That in the month of December, 1873, the plaintiff herein was, by resolution of the board of trustees of the defendant corporation, appointed to the office of treasurer of the defendant corporation,
46 and then accepted said office, with all the trusts and obligations belonging or incidental thereto, and continued to hold said office and to act as such treasurer from the time of said appointment until the 22d day of June, 1877.

2nd. That at the time the plaintiff was so appointed treasurer of the defendant, and during all the time the plaintiff held said office and acted as such treasurer, one Ignatz Steinhart was a trustee of the defendant, and from the time of said appointment until the first day of May, 1877, said Steinhart was the president and managing agent of the defendant.

3rd. That from the time of the said appointment of the plaintiff to the office of treasurer of the defendant, until the 22d day of June, 1877, said Steinhart was managing agent of the plaintiff corporation, and, as

this defendant is informed and believes, was largely interested as a stockholder therein, but was never interested in the defendant
47 corporation, except that he was the nominal holder of ten of the twelve thousand shares of the capital stock thereof, merely as a qualification for the office of trustee.

4th. That between the first day of January, 1874, and the 22d day of June, 1877, and whilst the plaintiff assumed to act, and did act, as treasurer of the defendant, it received as such treasurer at different times large sums of money, the property of the defendant, amounting, according to the information and belief of the defendant, to the sum of forty-three thousand dollars ($43,000.00) in gold coin of the United States, for which it has never accounted to the defendant.

5th. That defendant is informed and believes, and according to such information and belief alleges, that during the time that said Steinhart acted as managing agent and trustee of the defendant, and as
48 managing agent of the plaintiff as aforesaid, he managed the business of the defendant for the benefit and interest of the plaintiff and of J. and W. Seligman & Co., who were the owners of about five thousand shares of the capital stock of the defendant, and of a large portion of the capital stock of the plaintiff corporation, regardless of the interest of the stockholders of the defendant other than the J. and W. Seligman & Co.

6th. That on the 16th day of April, 1877, there were five trustees of the defendant corporation, viz., J. D. Fry, L. Jacobi, S. Heydenfeldt, Inatz Steinhart, and Wm. M. Stewart, and on that day the said Steinhart, Fry, and Heydenfeldt, in the absence of said Stewart and Jacobi, wrongfully convened as a board of trustees of the defendant, without any previous notice to said Stewart and Jacobi of such meeting; and at said meeting, wrongfully and without authority of law, called
49 a meeting of the stockholders of the defendant to meet on the first day of May, 1877, for the purpose of electing a board of trustees of the defendant corporation, and in pursuance of said call, a meeting of the stockholders, representing less than one half of the capital stock of the defendant, was held on said first day of May, 1877. At said meeting the said J. & W. Seligman & Co. was represented by said Steinhart, Heydenfeldt, and one F. A. Benjamin, who, for the fraudulent purpose of making it appear that a majority of the stock was represented at said meeting, wrongfully and without any authority caused to be issued to and represented by one Hyman Bush one thousand shares of said stock then the property of William Sharon, Thomas Bell, and Flood and O'Brien, which last mentioned 1,000 shares of stock were wrongfully voted at said meeting without any authority
50 from said owners thereof; that the result of said meeting was the election of Ignatz Steinhart, S. Heydenfeldt, F. A. Benjamin, P. N. Lilienthal, and Otto Esche, as trustees of defendant.

7th. That on the 9th day of June, 1877, Wm. M. Stewart, S. D. R. Stewart, Wm. F. Herrin, Geo. C. Gorham, jr., and W. W. Foote, commenced an action in the district court of the 19th judicial district of the State of California, in and for the city and county of San Francisco, against the said Steinhart, Heydenfeldt, Lilienthal, Benjamin, Esche, and this defendant, for the purpose of having the said unauthorized election declared void and set aside by said court, and for the further purpose of ordering a new election of trustees for defendant. That on this last mentioned action such proceedings were regularly had that on the 21st day of June, 1877, at 11 o'clock a. m., said last-mentioned court ordered, adjudged, and decreed that said meeting

51 of stockholders held on the 21st day of May, 1877, as aforesaid, was illegal, invalid, and void; that neither said Steinhart, Heydenfeldt, Lilienthal, Esche, nor Benjamin was entitled to the office of trustee of the defendant by virtue of said election; and that a meeting of the stockholders of the defendant, for the purpose of electing its trustees, should be held on the 22d day of June, 1877, pursuant to a call and notice previously made and published according to law.

8th. That after said judgment and decree was pronounced and rendered by said last-mentioned court, and after the said defendants in said last-mentioned action and the plaintiff herein had notice thereof, the said Steinhart, Benjamin, and Heydenfeldt caused to be drawn, signed, and delivered the alleged promissory note set out in the plaintiff's complaint herein; and, according to its information and belief the
52 defendant alleges that there was no consideration for said promissory note, and that it was drawn, signed, and delivered by said Steinhart, Benjamin, and Heydenfeldt for the purpose of cheating and defrauding the stockholders of the defendant other than the said J. & W. Seligman & Co.

9th. That, according to its information and belief, the defendant further alleges that through the management of said Steinhart the plaintiff herein has wrongfully expended and converted to its own use large portions of the money of the defendant received by it as treasurer of the defendant, as aforesaid; that it wrongfully paid from said money of the defendant a demand of said Heydenfeldt against said J. & W. Seligman & Co., amounting to two thousand five hundred dollars ($2,500), and also applied large sums of defendant's money to the payment of interest falsely and wrongfully claimed to be due from the defend-
53 ant to the plaintiff; and that it has paid from said money a large number of checks, in sums not known to the defendant; drawn without authority from the defendant, and for purposes foreign to the business of and not properly chargeable to the defendant; of all which it, the plaintiff, had notice.

10th. Defendant further alleges that in pursuance of said judgment and decree of said district court of the 19th judicial district, a meeting of the stockholders of the defendant, for the purpose of electing trustees, was duly held on the 22d day of June, 1877, at which meeting Wm. M. Stewart, S. D. R. Stewart, Wm. F. Herrin, Geo. C. Gorham, jr., and W. W. Foote were duly elected trustees of the defendant, and they and their successors in office ever since have been, and still are, the lawful and only trustees of the defendant.

11th. Defendant further alleges upon its information and belief, that upon a fair and honest accounting the plaintiff will be found to
54 be indebted to the defendant in a considerable sum of money for money had and received by the plaintiff as treasurer of defendant, as aforesaid.

V. And defendant for a further and separate defense herein alleges:

That on the 13th day of June, 1877, the said Wm. M. Stewart, S. D. R. Stewart, Wm. F. Herrin, Geo. C. Gorham, jr., and W. W. Foote as stockholders of the defendant, commenced an action in the district court of the 19th judicial district of the State of California, in and for the city and county of San Francisco, against the said Steinhart, Heydenfeldt, Lilienthal, Benjamin, and Esche, defendants, to enjoin them from acting in any way as directors of the defendant herein, and the judge of said court thereupon, on the 13th day of June, 1877, duly made and entered an order in said action restraining the defendants therein, among other things, from taking any further steps and proceed-

55 ings whatever in or about the working, management, or control of the defendant herein, or any of the property thereof, and from contracting, or incurring any indebtedness or liability against said defendant, and from acting or assuming to act, as directors of said defendant.

That said order was afterwards, on the 13th day of June, 1877, duly served upon the said Steinhart, and on the 14th day of June, 1877, upon such of the remaining said defendants who had full notice thereof; and that said order remained and was in full force and effect upon and after the 21st day of June, the time when the note set out in the complaint was attempted to be made by the said defendants as directors of the defendant herein; of all which the plaintiff herein had notice on said 13th day of June, 1877, and before said note was made or delivered, and at all times thereafter.

The defendant therefore prays that an accounting between the
56 plaintiff and defendant may be had, and that the defendant may have judgment against the plaintiff for such sum as may be found due the defendant upon such accounting.

STEWART, VANCLIEF & HERRIN,
Attorneys for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Sherwood F. Gorham, being first duly sworn, deposes and says that he is secretary of the Mahoney Mining Company, the defendant in the above entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

SHERWOOD F. GORHAM.

57 Subscribed and sworn to before me this 26th day of July, A. D. 1878.

[SEAL.] HOLLAND SMITH,
Notary Public.

(Endorsed:) Filed 26 July, A. D. 1878. L. S. B. Sawyer, clerk.

58 *Findings.*

In the circuit court of the United States for the ninth circuit, State of California.

THE ANGLO CALIFORNIAN BANK (LIMITED), plaintiff,
vs.
THE MAHONEY MINING COMPANY, DEFENDANT.

Findings of court.

The above entitled action came on regularly for hearing and trial the 26th day of July, 1878, Geo. F. and Wm. H. Sharp, appearing as counsel for the plaintiff, and Stewart, Vanclief & Herrin, as counsel for the defendant. A trial by jury having been waived by the counsel for the respective parties, the said action was tried by the court without the interven-

59 tion of a jury, whereupon witnesses were duly examined on behalf of the plaintiff and defendant, and documentary evidence being also introduced by both parties, and the evidence being closed, and thereupon, after hearing the arguments of counsel for the respective parties, the cause was submitted to the court for consideration and decision; and after due consideration the court makes the following finding upon the facts, to wit:

I. The plaintiff, The Anglo Californian Bank (limited) is a corporation duly incorporated, organized and existing, under the laws of Great Britain, and has been at all times since December 22d, 1873, doing business as a bank in the city and county of San Francisco, State of California.

II. The defendant, The Mahoney Mining Company, is a corporation created for mining purposes, and was organized and incorporated
60 as such under the laws of the State of California, on the 22d day of December, 1873.

III. From the time of the incorporation of the defendant until the 22d day of June, 1877, the plaintiff acted as the treasurer of the defendant, as hereinafter stated.

IV. During such time the monies of the defendant were deposited from time to time with the plaintiff, and were paid out by the plaintiff from time to time upon checks signed by the president and secretary of the defendant, and in addition thereto, an overdraft was paid by the plaintiff upon like checks, which overdraft, including proper allowance for interest, amounted on the 21st day of June, 1877, to $6,319\frac{59}{100}$.

V. No resolution or special authority of the defendant was shown authorizing its president and secretary, or either of them, to over-
61 draw its account in the bank.

VI. On the 21st day of June, 1877, at 11 o'clock a. m., in an action then pending in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, wherein certain stockholders of the defendant were plaintiffs, and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Otto Esche, F. N. Benjamin, and the defendant herein were defendants, which action had been brought to remove the said parties named from office as directors of the defendant, a decision was announced by the court to the effect that said persons above named should be ousted and removed from office as directors of the defendant, and that the election under which they acted as directors of the defendant was invalid and void.

62 VII. At the time said decision was announced, as aforesaid, the findings of fact of said court, and the judgment therein in conformity to said decision, were reduced to writing, dated of said day, but were not filed with the clerk of said court until the 22d day of June, 1877; and the said judgment was recorded by said clerk upon said last-named day. From said judgment an appeal was taken June 22d, 1877, but no stay of proceedings was allowed by the court.

VIII. In the afternoon of said 21st day of June, 1877, after the announcement of said decision of said court as aforesaid, the said persons above named met as a board of directors of the defendant, when its president informed them that the account of the defendant with plaintiff was overdrawn to the amount of $6,319\frac{59}{100}$, gold coin of the United States, and that the manager of plaintiff required either the
63 money or a note of the company. A resolution was thereupon adopted authorizing the president and secretary of defendant to execute the note in suit. Said note was thereupon made in pursuance

of said resolution for the sum of $7,500, to cover the amount overdrawn and other anticipated advances; but no such advances were afterwards made.

IX. At the time said resolution was adopted as aforesaid, the said persons had notice of the decision announced by the district court in the manner and form aforesaid.

As a conclusion of law from the foregoing facts, the court finds that the plaintiff is entitled to recover against the defendant upon the note sued on for the amount of the overdraft, viz: the sum of six thousand three hundred and nineteen and $\frac{59}{100}$ dollars, with interest at the
64 rate specified in said note.

Let judgment be entered accordingly.

FIELD, *J.*

OCTOBER *4th*, 1878.

(Endorsed:) Filed October 4, 1878. L. S. B. Sawyer, clerk.

65 *Judgment.*

In the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California.

THE ANGLO CALIFORNIAN BANK (LIMITED) *vs.* THE MAHONEY MINING COMPANY. } No. 1837.

This cause having come on regularly for trial, on the 26th day of July, A. D. 1878, being a day in the July term, A. D. 1878, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties hereto, duly filed with the clerk of said court, W. H. Sharp, esq., appearing on behalf of plaintiff, and Wm. M. Stewart and W. F.
66 Herrin, esqs., on behalf of defendant, and the trial having been proceeded with on the 31st day of said July and the 1st day of August of said year and term, and witnesses on the part of the plaintiff and of the defendant having been sworn and examined and the evidence being closed, the cause after arguments of counsel having been submitted to the court for consideration and decision, and the court after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance therewith; now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the Anglo Californian Bank, limited, plaintiff, do have and recover of and from the Mahoney Mining Company, defendant, the sum of seven thousand seven hundred seventy-three $\frac{02}{100}$ dollars, gold coin of the United States, and its costs in this behalf expended, taxed at
67 seventy $\frac{90}{100}$ dollars ($70.90).

Judgment entered the 4th day of October, A. D. 1878.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of the original judgment entered in the above entitled cause.

Attest my hand and the seal of said circuit court this 4th day of October, A. D. 1878.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Filed October 4, 1878. L. S. B. Sawyer, clerk.

68 *Certificate of clerk to judgment-roll.*

In the circuit court of the United States, ninth judicial circuit, district of California.

THE ANGLO CALIFORNIAN BANK (LIMITED)
vs
THE MAHONEY MINING COMPANY.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein entitled action.

Witness my hand and the seal of said circuit court this 4th day of October, A. D. 1878.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

69 (Endorsed:) Judgment-roll. Filed 4th October, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

70 *Opinion.*

In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

THE ANGLO CALIFORNIAN BANK (LIMITED)
vs.
THE MAHONEY MINING COMPANY.

The plaintiff is a corporation created under the laws of Great Britain; the defendant is a corporation formed under the laws of California. This action is brought to recover the sum of six thousand three hundred fifty-one $\frac{72}{100}$ dollars alleged to be due from the defendant to the plaintiff, with interest from June 21st, 1877. It was commenced in a district court of the State, and on petition of the defendant was removed
71 to the circuit court of the United States. The complaint contains two counts: one for monies loaned the defendant and monies expended for its issue; the other for an amount due upon a promissory note of the defendant for seven thousand five hundred dollars, bearing date on the 21st of June, 1877, payable in gold coin one day after date, with interest at the rate of one and one-half per cent. a month until paid.

It appears in evidence that from the original organization of the Mahoney Mining Company, up to the 22d of June, 1877, the Anglo Californian Bank acted as its treasurer. Its monies were from time to time deposited with the bank, and drawn out on checks of the company signed by its president and secretary. The account taken from the books of the bank, the correctness of which is not disputed, shows a series of deposits made by the company from January 8th, 1874, to June 5th,
72 1877, inclusive, and a series of its checks paid by the bank from January 19th, 1874, to June 27th, 1877, inclusive. Upon this account a balance appears to be due the plaintiff at this latter date, after proper allowances of interest, amounting to the sum demanded in this suit. Of this sum only thirty-two dollars and thirteen cents were paid after the removal of the directors as hereafter mentioned.

On the 21st of June, 1877, at a special meeting of the directors of the mining company held in the afternoon of that day, its president informed them that the account of the company at the bank was overdrawn to the amount of six thousand three hundred and nineteen $\frac{59}{100}$ (6,319$\frac{59}{100}$) dollars, and that the managers of the bank required either the money or a note of the company. A resolution was thereupon adopted authorizing the president and secretary to execute the note in suit. It
73 was made for the sum of seven thousand five hundred dollars to cover not merely the amount overdrawn, but other anticipated advances. It is admitted by the counsel of the plaintiff that the note can be enforced only for the amount then due, with subsequent interest to date, and he asks a recovery thereon only to that extent.

The liability of the defendant for the amount overdrawn is denied on the ground that its president and secretary were not empowered to overdraw its account with the bank, and thus incur a debt for the company without special authorization of its directors; and that the attempted ratification of their action in this respect by the passage of the resolution on the 21st of June, 1877, and the execution of the note in suit, was ineffectual for any purpose, on the alleged ground that the directors had been at that time by judicial decree removed from office.

74 It may be true, as contended by counsel, that the president and secretary of the defendant were not empowered to overdraw its account, and that without special authority of its directors they could not in this way impose a liability upon the company. We do not deem it important to question the correctness of the position; we are inclined to the opinion that it is sound. The company will, however, be held liable for the amount, if the acts of its president and secretary in this respect were subsequently ratified by its directors. Such ratification might have been made directly by a resolution in terms approving of their action, or it might have been made indirectly by ordering the payment of the overdraft, or the issue of evidences of its liability for the amount in the form of a note or bond. The latter mode was pursued, and it ac-
75 complished the purpose designed, if the directors who acted in passing the resolution mentioned, were then in office. That resolution was a clear recognition and approval of the conduct of the president and secretary, if the directors were at the time capable of acting. The question therefore is whether they were then in office.

It appears that in a suit instituted in a district court of the State to remove the directors, a decision was rendered on the 21st of June, 1877, at eleven o'clock in the forenoon, declaring that the election of the directors then in office was illegal and void, and that a meeting called for an election of directors on a subsequent day was legal and valid; and that the findings and decree of the court carrying this decision into effect were prepared and dated the same day, but were not filed with
76 the clerk, and entered of record until the following day, June 22d. The question, therefore, is, when did this decree operate to oust the directors from office; when, in other words, did it take effect? For until then the parties ousted were officers de facto, holding under color of an election, and having charge of the affairs of the company, and capable of binding it in all matters legitimately devolving upon directors of the company. (Baird v. The Bank of Washington, 11 Serg't & Rawle, 411; Delaware and Hudson Canal Co., v. Pa. Coal Co., 4 Pa. State, 131.)

It seems to us clear that the decree did not take effect until it was regularly filed or entered of record. Until it left the possession of the judge of the court he could change it in any and all particulars; he

could add to it or limit or reverse it. By the oral decision he had
77 only announced his opinion; that opinion did not take the form of an authoritative decree until it had been filed with the clerk and thus became a matter of record. Until then it was not binding upon any one. The case was tried by the court without the intervention of a jury, and in such cases its findings must precede the entry of the decree, and the statute requires that they shall be filed with the clerk. (Code of Civil Procedure, sec. 632.)

The case cited by counsel from the supreme court of Vermont, The town of Huntington v. The town of Charlotte, (15 Vt., 50), does not in our judgment militate against these views. The opinion of the court in that case had reference to the formal enrollment of the decree, for it says that the decree was for all the purposes intended good when passed—that is, when reduced to form and approved by the judge, and the question was whether the omission of
78 the clerk to personally spread it on the records, prevented it from taking effect at the time when it was thus rendered. The court held that it did not; that the efficacy of the judgment did not depend upon the action of a functionary who had nothing to do with its rendition, and who by law was vested with no power or authority but the mere ministerial duty of enrolling it. We see nothing to question in this decision; but it has no application to the case at bar. Here there was nothing with reference to which the clerk could act at all until the findings and decree were filed by the district judge. Until then there was no legal form given to the decision of the court. The findings announced required, under the statute, the signature of the judge, and their previous filing was essential to the entry of any judg-
79 ment. The clerk could not add the signature of that officer, even if he could have drawn up in form the conclusions which the court had announced. (See Whitney v. Belden, 4 Paige, 140; and 2d Daniel's Chan. Practice, 1217.)

The fact that the directors, or some of them, were informed of the decision announced by the judge of the district court when the resolution was passed does not change the efficacy of the resolution as a ratification of the action of the president and secretary in making the overdraft. They knew that the decision was not necessarily final; that it might possibly be changed upon petition of counsel, or upon the judge's own motion. They knew at least that a decision announced was not a decree entered, and they were not required to govern their action as though the one was equally operative as the other upon their position and rights as directors.

80 It is also contended by counsel of the defendant that the resolution was ineffectual as a ratification on the alleged ground that it was passed whilst an order made in another suit by a State court was in force restraining the parties from acting as directors. That case was subsequently abandoned, and it is stated by counsel of the plaintiff here that the order was at the time discharged. But assuming that it was not discharged when the resolution was passed, we do not see how it can be held to have affected the plaintiff, not a party to the suit. The parties disobeying the order may have been proceeded against as for a contempt in the State court, but the order could not impair the efficacy of their action with a third party.

Upon a careful consideration of the whole case, we have come to the conclusion that the plaintiff is entitled to recover against the de-
81 fendant upon the note for the amount of the overdraft, as shown by the account and expressed in the resolution of the 21st of

June, 1877, namely, the sum of six thousand three hundred nineteen $\frac{59}{100}$ dollars, with interest at the rate specified. Findings will be filed to that effect and judgment entered thereon.

FIELD, *J.*

SEPTEMBER 26, 1878.

(Endorsed:) Filed 26 September, 1878. L. S. D. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

82 *Bond on writ of error.*

"Resolved, That the Mahoney Mining Company execute an appeal bond in the action of the Anglo Californian Bank (limited) vs. The Mahoney Mining Company, on appeal to the Supreme Court of the United States, in such form and sum as may be necessary to operate as a supersedeas to execution on the judgment in said action; and that the secretary is hereby authorized to execute such bond."

I, the undersigned secretary of the Mahoney Mining Company, hereby certify that the foregoing is a full, true and correct copy of a resolution passed by the board of directors of said company on the 3d day of October, A. D. 1878, at a meeting of said board duly convened and held on said day.

Attest my hand and the seal of said company this 3rd day of
83 October, A. D. 1878.

[SEAL.] SHERWOOD F. GORHAM,
Sec'y Mahoney Mining Company.

84 *Bond on writ of error.*

In the circuit court of the United States, ninth circuit, for the district of California.

THE ANGLO CALIFORNIAN BANK (LIMITED), plaintiff,
v.
THE MAHONEY MINING COMPANY, DEFENDANT.

Know all men by these presents that we, The Mahoney Mining Company, as principal, and William M. Stewart, of San Francisco, California, and Thomas Bell, of San Francisco, as sureties, are held and firmly bound unto the Anglo Californian Bank (limited), of the city and county of San Francisco, State of California, in the sum of ten thousand dollars,
gold coin of the United States, to be paid to said bank, or its as-
85 signees, to which payment, well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the fourth day of October, A. D. 1878.

Whereas the aboved named Mahoney Mining Company is about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the said circuit court of the ninth circuit.

Now, therefore, the condition of the above obligation is such, that if the above named Mahoney Mining Company shall prosecute said writ of error to effect, and answer all costs and damages if it shall fail to

make good its plea, the said obligation shall be void, otherwise to remain in full force and virtue.

86 MAHONEY MINING COMPANY,
By SHERWOOD F. GORHAM, [SEAL.]
Secretary.

THOMAS BELL. [SEAL.]
WM. M. STEWART. [SEAL.]

On the 2nd line from the top of 2nd page of bond, the word "third" was erased and the word "fourth" interlined before execution.

JAMES L. KING.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Thomas Bell and William M. Stewart, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says that he is a resident in said city and county, and is worth double the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive
87 of property exempt from execution.

THOMAS BELL.
WM. M. STEWART.

Subscribed and sworn to before me this fourth day of October, 1878.
[SEAL.] JAMES L. KING,
Notary Public.

(Endorsed:)

The within bond is approved both as to its form and the sufficiency of the sureties thereon to stay proceedings on the judgment pending the writ of error.

Oct. 4, 1878.

FIELD, *J.*

Filed October 4, A. D. 1878.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

88 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing eighty-seven written pages, numbered from 1 to 87, inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court this 18th day of October, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Dep'y Clerk.

(Indorsement on cover:) No. 324. The Mahoney Mining Company, plaintiff in error, vs. The Anglo Californian Bank (limited). California C. C. U. S. Filed 31st October, 1878.

OFFICE SUPREME COURT U. S.
FILED
OCT 15 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1881.

No. 78.

THE MAHONEY MINING COMPANY, Plaintiff in Error,

vs.

THE ANGLO-CALIFORNIAN BANK, (Limited,) Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
STEWART, VANCLIEF & HERRIN,
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1881. No. 78.

THE MAHONEY MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ANGLO-CALIFORNIAN BANK, (LIMITED,) DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of California.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Circuit Court for the District of California, in an action instituted by the Anglo-Californian Bank, (limited,) a British corporation, against the Mahoney Mining Company of California, to recover the amount of an alleged overdraft of the defendant at the bank of the plaintiff.

The suit was commenced on August 3, 1877, in the District Court for the City of San Francisco, and removed by defendant into the Court below.

The case was tried by the Circuit Court without a jury,

and upon the facts found by it, that Court, on October 4, 1878, rendered judgment in favor of the Anglo-Californian Bank, (limited,) against the Mahoney Mining Company, for the sum of $6,319.59, with interest at the rate of one and a half per cent. a month from June 21, 1877, amounting in all to $7,773.09, gold coin of the United States.

From that judgment, the Mahoney Mining Company prosecutes the present writ of error.

The complaint filed by the plaintiff in the Court below contained two counts: (1) a count upon an alleged indebtedness of $6,351.72 for money lent by plaintiff to defendant, and money paid and expended by plaintiff for the use of defendant, and at its request; (2) a count for the same amount alleged to be due the plaintiff upon an alleged promissory note of defendant for $7,500, dated June 21, 1877, payable in gold coin one day after date, with interest at the rate of one and a half per cent. a month until paid, as follows:

"$7,500. "SAN FRANCISCO, *June* 21, 1877.

"One day after date, without grace, for value received in United States coin, we promise to pay to the order of The Anglo-California Bank (limited) the sum of seven thousand five hundred dollars, with interest thereon at the rate of one and a half per cent. per month until paid—both principal and interest payable in like gold coin.

MAHONEY MINING COMPANY,
[SEAL.] By F. A. BENJAMIN, *President.*
By LOUIS KOPLAN, *Secretary.*"

This note, it was averred, was given for an indebtedness of defendant to plaintiff of $6,351.72 on an account stated, and to secure further advances.

Judgment was asked for the said sum of $6,351.72, with interest at one and a half per cent. per month from June 21, 1877, until paid. (Complaint, Rec., pp. 2, 3.)

The Mahoney Mining Company, in its answer, denied that it was indebted to the plaintiff in any amount, on any account whatever; and that it made the promissory note set out in the complaint; and that it was indebted to the plaintiff on said note, or any note, in any sum whatever.

The answer then set forth certain facts, showing that the note in question was not made by the competent authority of the Mahoney Mining Company, but was caused to be signed by certain deposed directors of that Company, without consideration, for the purpose of defrauding the majority of the stockholders. (Answer, Rec., pp. 14–17.)

The Circuit Court (Rec., pp. 18, 19) made the following

Finding of Facts.

I. The plaintiff, The Anglo-California Bank, (limited,) is a corporation duly incorporated, organized, and existing, under the laws of Great Britain, and has been at all times since December 22, 1873, doing business as a Bank in the City and County of San Francisco.

II. The defendant, The Mahoney Mining Company, is a corporation created for mining purposes, and was organized and incorporated as such under the laws of the State of California on the 22d day of December, 1873.

III. From the time of the incorporation of the defendant until the 22d day of June, 1877, the plaintiff acted as the treasurer of the defendant, as hereinafter stated.

IV. During such time the moneys of the defendant were deposited, from time to time, with the plaintiff, and were paid out by the plaintiff, from time to time, upon checks signed by the President and Secretary of the defendant, and in addition thereto, an overdraft was paid by the plaintiff upon like checks, which overdraft, including proper allowance for interest, amounted on the 21st day of June, 1877, to $6,319.59.

No resolution, or special authority, of the defendant was shown authorizing its President and Secretary, or either of them, to overdraw its account in the Bank.

VI. On the 21st day of June, 1877, at 11 o'clock A. M., in an action pending in the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco, wherein certain stockholders of the defendant were plaintiffs, and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Otto Esche, F. N. Benjamin, and the defendant herein, were defendants, which action had been brought to remove the said parties named from office as directors of the defendant, a decision was announced by the Court to the effect that said persons above named should be ousted and removed from office as directors of the defendant, and that the election under which they acted as directors of the defendant was invalid and void.

VII. At the time said decision was announced, as aforesaid, the findings of fact of said Court, and the judgment thereon in conformity to said decision, were reduced to writing, dated of said day, but were not filed with the clerk of said Court until the 22d day of June, 1877; and the said judgment was recorded by said clerk upon said last-named day. From said judgment an appeal was taken June 22, 1877, but no stay of proceedings was allowed by the Court.

VIII. In the afternoon of said 21st day of June, 1877, after the announcement of said decision of said Court as aforesaid, the said persons above named met as a Board of Directors of the defendant, when its President informed them that the account of the defendant with the plaintiff was overdrawn to the amount of $6,319.59, and that the manager of the plaintiff required either the money or a note of the Company. A resolution was thereupon adopted authorizing the President and Secretary of defendant to execute the note in suit. Such note was thereupon made in pursuance of said resolution for the sum of $7,500 to cover the amount overdrawn, and other anticipated advances; but no such advances were afterwards made.

IX. At the time said resolution was adopted as aforesaid, the said persons had notice of the decision announced by the District Court in the manner and form aforesaid.

The Court filed also the following

Conclusion of Law.

As a conclusion of law from the foregoing facts, the Court below found that the plaintiff was entitled to recover against the defendant upon the note sued on for the amount of the overdraft, viz., the sum of $6,319.59, with interest at the rate specified in said note. (Rec., p. 19.)

Judgment was entered accordingly in favor of the Anglo-California Bank for the sum of $7,773.09, gold coin of the United States, and costs of suit. (Rec., p. 19.)

The Mahoney Mining Company thereupon sued out this writ of error.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in deciding that upon the facts found by it, the Anglo-Californian Bank (limited), defendant in error, was entitled to recover against the Mahoney Mining Company, plaintiff in error, upon the note sued on, for the amount of the said overdraft, viz., $6,319.59, with interest at the rate specified in said note, and in rendering judgment for the defendant in error against the plaintiff in error, upon the said note, for the said sum.

2. The Circuit Court erred in not rendering judgment, upon the facts found by it, in favor of the Mahoney Mining Company, plaintiff in error, and against the defendant in error, the Anglo-Californian Bank, (limited.)

ARGUMENT.

First.

The most favorable view that can be taken for the Bank of this transaction of the overdraft by the President and Secretary of the Mining Company, is that it was a loan of money on the credit of that Company; and so the Bank has elected to consider it, as appears by the first count of the complaint, which declares, as has been seen, for money *lent* to the Mining Company.

The nature of the contract implied by the payment of an *overdraft*, as a loan of money to the drawer, is considered by Mr. Morse in the course of his judicious observations on the subject of *overdrafts* in his excellent work on *Banks and Banking*, pages 316-319.

The questions, therefore, arising upon the finding of facts, are: (1) Whether the President and Secretary had power to borrow the amount of the overdraft for the Mining Company? (2) If not, whether the Directors of that Company could subsequently ratify the transaction, and bind the Company to the payment of the money? (3) If they could, whether the persons, under whose resolution, on the 21st of June, 1877, the note in suit was executed, were, at that time, in office and capable of acting as Directors of the Mining Company?

Second.

There can be no just doubt, we apprehend, that neither the President and Secretary of the Mining Company, con-

jointly, nor either of those officers, separately, had any power or authority to draw this overdraft, or borrow money for the Company; and that there can be no recovery by the Bank, in this case, unless the resolution of the persons who met as a board of directors, on the afternoon of the 21st of June. 1877, can be held and deemed a valid and effectual ratification of the transaction by the competent authority of the corporation.

1. It is clear that neither the President nor Secretary had any previous express power, general, or special, to overdraw the balance of the account of the Mining Company at the bank of the defendant in error, or borrow any money for the Company.

It is found that the Mahoney Mining Company is a corporation organized and incorporated under the laws of the State of California.

By section 305 of the *Civil Code of California*, the corporate powers, business, and property of all corporations formed under its provisions, (as that Company was,) must be exercised, conducted, and controlled by the Board of Directors.

By section 308 of the *Civil Code*, the President and Secretary are to perform the duties enjoined on them *by law* and the *by-laws of the corporation.*

No authority is conferred on the President or Secretary of a Mining corporation, by law, to borrow money.

It is not found that the plaintiff in error had any by-laws, and, in fact, none existed. No power or authority, therefore, was conferred upon its President, or Secretary, in that way.

The only other way, then, in which those officers could have been expressly authorized, or empowered, to overdraw the account of their Company at the bank, was by a

special resolution, or vote, of the directors, or stockholders, of the Mining Company.

But there never was any such resolution, or vote.

The fifth finding of the Court below expressly is, that "*No resolution, or special authority, of the defendant was shown authorizing its President and Secretary, or either of them, to overdraw its account in the bank.*" (Rec., p. 18.)

2. It is equally clear that neither the President, nor Secretary, had authority, by virtue of any power inherent in his office, or implied from his appointment, to borrow money on the credit of the corporation, or impose a liability on the Company by overdrawing its account at the bank of the defendant in error.

Under the settled principles of law applicable to such corporation, and the interpretation of its charter, constanting instrument, or organic law, the directors are the only agents of the Company who have any *inherent power* to borrow money on its credit, in any manner, or for any purpose, and none of its officers can lawfully exercise such a power, except in virtue of some special delegation of authority by the Board of Directors.

This is so clear that authorities are almost unnecessary; and the proposition was, in effect, conceded by the learned Justice who delivered the opinion of the Court below. (Rec., p. 21, *fol.* 74.)

As has been seen, the organic law of this Company expressly provides that its corporate powers, business, and property shall be exercised, conducted, and controlled by its *Board of Directors;* and this authority is vested exclusively in that body, and cannot therefore reside in any other corporate officers, or agents.

The exercise of discretionary authority over the affairs and property of such a corporation, is thus the peculiar and exclusive province of the Board of Directors; and certainly

if any act is of that character, or within that category, it is borrowing money for the corporation, and so it has been uniformly held by all Courts who have pronounced upon the subject; and it has never been supposed that the power to borrow money can be validly exercised by any executive, or ministerial, officer of such a corporation without a special delegation of authority from the Board of Directors.

The decision in the leading case of *Ridgeway* v. *Farmers' Bank*, (12 Serg. & Rawle, 265,) that the directors of a Bank have power to authorize the President and Cashier to borrow money, proceeds on the ground of the exclusive authority of the directors to make, or authorize, such transactions.

The proposition that the power to borrow money for such a company as this, is exclusively vested in the directors, is adjudged by the principles of the decision of the Supreme Court of Wisconsin, in the case of *Walworth County Bank* v. *Farmers' Loan and Trust Company*, (14 Wis., 330,) which involved the power of the President of a Railroad Company to sell its personal property, in payment of its debts.

It was held that the President could not, by virtue of any power inherent in his office, dispose of the personal property of the corporation for any purpose, and that he could not exercise such a power without special authority from the Board of Directors.

The Court said:

"It is probable that the general custom is, for the Board of Directors to clothe the President of the road with exclusive authority over its management and concerns; but the fact that this power is conferred either by some article in the by-laws, or by a special resolution of the Board, shows conclusively that it is not inseparable from the office. The act of incorporation provides that the affairs of the company shall be managed by a Board of Directors, who shall be chosen as therein prescribed. The Board are to appoint one of their number President, and were to have power to make such by-laws and rules, not inconsistent with the

Constitution and laws of the State, as might be necessary for the well-ordering of the affairs of the corporation. The charter does not anywhere prescribe the powers and duties of the President, and they are undoubtedly such as were conferred upon him by the Board of Directors."

The Supreme Court of Maine, in the case of *Brown* v. *Weymouth*, (36 Me., 417.) had before it the question of the power of the Treasurer of a Company, whose charter provided "that the property and affairs of the Company shall be managed by a Board of Directors," to pay the debts of the corporation.

The Court said:

"The Treasurer by the charter was authorized to receive assessments due from the stockholders, but he had no authority to pay the debts of the Company unless by order of the directors, nor to cancel, compromise, or set off claims due from the Company by those due to it. Any attempt on his part thus to control the business of the Company would be to assume powers specifically conferred by the charter upon the directors, and all such acts, unless ratified by the Company, would be void."

The case of *Life and Fire Insurance Company* v. *Mechanics' Fire Insurance Co.*, (7 Wend., 34,) involved the identical question of the authority of the President of a corporation to borrow money; and it was decided that such a power is not implied from his appointment as President: as such he is merely the presiding officer of the Board of Directors, chosen by them from their own body, and has no more authority from the charter to bind the Company by any of his acts, than any other director has; his powers are such only as the Board of Directors, either by their by-laws, or otherwise, think proper to confer upon him.

The Court said, to hold the corporation responsible for his acts in the premises, "would be to establish the principle that the Presidents of all the incorporated companies in the State had authority, by virtue of their offices merely,

without reference to the powers actually conferred upon them, to pledge the responsibility of the Company to any extent — a doctrine at war with fundamental principles, and which would be utterly subversive of the rights of all stockholders in these public associations."

It is well settled that the executive, or ministerial, officers and agents of a corporation, can only bind it in relation to its common and ordinary business.

Angell & Ames on Corporations, sec. 299 *et seq.*
Hoyt *v.* Thompson, 5 N. Y., 333.
Blen *v.* Bear River & A. W. S. M. Co., 20 Cal., 612.

Borrowing money is certainly not a matter arising in the ordinary course of the business of a Mining Company.

It has been also declared frequently by this Court, and other Courts of authority, that such officers have authority, *ex officio*, to bind their corporations by such acts only as fall within the scope of their ordinary and legally inherent powers and duties.

Angell & Ames on Corporations, sec. 301.
Morse on Banking, p. 69.
Fleckner *v.* Bank of U. S., 8 Wh., 338.
Minor *v.* Mechanics' Bank of Alexandria, 1 Pet., 46.
Bank of U. S. *v.* Dunn, 6 Pet., 51.
U. S. *v.* City Bank of Columbus, 21 How., 364.
Hoyt *v.* Thompson, 5 N. Y., 333.

The doctrine that a President or Secretary of a mining corporation, or both together, may by virtue of their respective offices, borrow money, or make other extraordinary contracts, for the corporation, is at war with fundamental principles, and would be utterly subversive of the rights of stockholders.

Even in the case of the Cashier of a Bank, who is *virtute officii*, generally intrusted with the notes, securities, and other funds of the Bank, and held out to the world as its general agent in the negotiation, management, and disposal of them, it has been held that the term "ordinary business," with reference to his duties, does not comprehend a contract made by him, without an express delegation of power from a Board of Directors to do so, which *involves the payment of money*, unless it be such as has been loaned in the usual and customary way.

U. S. *v.* City Bank of Columbus, 21 How., 364.

3. It is not found, by the Circuit Court, that any previous acts of like character, were done by the President and Secretary of the Mining Company, or that they were held out to the public as authorized agents to borrow money for the Company.

It does not appear that these officers did ever before, in any single instance, overdraw the account of the Company with the Bank, or borrow any money for the Company with the knowledge or acquiescence of the directors.

Power, or authority, on the part of those officers, to make this overdraft, or to borrow money for the Mining Company, cannot, therefore, be inferred, or implied, from the antecedent performance of acts of like character by the President and Secretary, with or without the knowledge, or assent, of the directors, or the corporation.

It is not even found, as matter of fact, by the Circuit Court, that the President and Secretary, of this Company, or either, had authority from the Company, to draw checks for its moneys on deposit with the plaintiff, or that there was an established usage for the Presidents and Secretaries of such companies to exercise such a power.

It is clear that they, nor either of them, were, or was, authorized, by virtue of their respective offices, to draw on

the Bank for any funds standing to the credit of the Mining Company.

Neither the President, nor Secretary, of such a Company, is the ordinary general fiscal officer of the corporation. (Fulton Bank *v.* N. Y. and Sharon Canal Company, 4 Paige, 135; Morse on Banking, pp. 132, 268.) And the power to draw checks, if not regulated by statute, or charter, is left to be conferred by the by-laws, or special action, of the directors. (Morse on Banking, p. 269.)

But even if the President and Secretary of the Mahoney Mining Company had, or it may be inferred that they had, power to draw checks, in the ordinary course of business, for moneys of the Company on deposit with the Bank, it cannot be inferred, from the exercise of such a power, that they had authority to overdraw its account, and impose in this way a liability upon the Company; and the Bank, in paying this overdraft, was bound to see that the officers had due authority from the Company to make it, or otherwise submit to the consequence resulting from their omission to take that just and proper precaution.

The eighth finding of the Circuit Court states that on the afternoon of the 21st of June, 1877, the President informed the pretended directors "that the account of the defendant with plaintiff was overdrawn to the amount of $6,319.59, and that the manager of plaintiff required either the money or a note of the Company."

It is not found that the plaintiff in error had any knowledge, or notice, of the overdraft, or, indeed, of the drawing of any checks by its President or Secretary, until the above statement was made on the 21st of June, 1877.

4. It is not found by the Circuit Court, as matter of fact, that there was any established usage for the Presidents and Secretaries of Mining Companies, in San Francisco, to borrow moneys for the corporations.

Usage, or custom, cannot therefore be resorted to, in

the corporation, duly signed by officers competent to draw checks. (Serrell *v.* Derbyshire Railroad Co., 9 C. B., 811)

This is all the more important in the case of an *overdraft* by officers of a corporation, the drawing and payment of which are both irregular transactions, and need all the explanation that can be given them.

Of course, unless the money sued for was advanced to the President and Secretary avowedly for the Mining Company, any ratification would be ineffectual between the parties to this suit. (Story on Agency, sec. 251*a*.)

2. Had the directors of the Mining Company power to ratify a contract made without authority by the President and Secretary, the consideration of which was not received by the Company, or appropriated, or applied, to its benefit? Had they power to pledge the capital and property of the Company for the payment of moneys unlawfully borrowed by its officers, and from which it received no benefit or advantage? Had the directors power to issue a promise of the corporation to pay the individual debt of the officers, in which the Company had no interest?—for such it was, upon the principle that where an agent of a corporation makes a contract beyond the limits of his authority, he is bound himself individually, although he purports to act in his representative capacity. (Angell & Ames on Corporations, sec. 303; Walker *v.* Bank, 5 Seld., 582; Haynes *v.* Hunnewell, 42 Maine, 276.)

It is submitted that they had not; and that the defendant in error was bound to show, in claiming under the pretended ratification, that the money loaned was received, or used, by the Company, or expended for its purposes.

If it should be said that the receipt of the consideration of such a contract would of itself operate as a ratification, and no other would be necessary, the answer is that where the alleged ratification by a corporation of the unauthorized contract of its agent, consists in its having received

the consideration of the contract, it must be proved that the corporation, through its proper officer or officers, *knew* the terms of the contract, and on what account the money was by them received. (Penn. Co. *v.* Dandridge, 8 Gill. and John., 249; Hilliard *v.* Goold, 34 N. H., 239; Christian University *v.* Jordan, 29 Misso., 68.)

The contention here merely is, that the *fact* of the receipt or use of the money by the corporation, is necessary to give validity to a ratification of such an unauthorized contract, though the directors may have had no *knowledge* of the contract and on what account the money was received.

It must be conceded that the powers of the directors of such a corporation for the government and management of its business, are not unlimited, and that if they exceed their legitimate authority their principal is not bound by their unauthorized act. (Minor *v.* Mechanics' Bank of Alexandria, 1 Pet., 71.)

It has been held in England that although the deed of settlement of a mining corporation conferred on the directors the sole and entire control of the affairs and business of the Company, they had no implied authority to *borrow money* on the credit of the Company, however useful or necessary such a power might be to the object for which the Company was formed. (Burmester *v.* Norris, 6 Exch., 796.)

In this country, unfortunately, a different doctrine has found acceptance with the Courts; but it would be only a just limitation on the power of directors to borrow money, to declare that the power cannot be invoked to protect transactions, by unauthorized agents, involving the credit of the Company, the consideration of which was never received by the corporation, or went to its benefit.

The present case seems clearly to be within the principle of the decision of the Supreme Court of California, in *Hall* v. *Auburn Turnpike Co.*, (27 Cal., 257.)

That was an action on a note signed by the President and Secretary of the Company, given to secure a personal indebtedness of the Secretary to the plaintiff. No part of the consideration was received by the Company, or went to its benefit. The Secretary was indebted to the plaintiff, who wanted security, and the note of the corporation was given. After it was given it was ratified and approved by the Board of Directors, by an order spread on its minutes to that effect.

The Supreme Court disposed of the case by saying:

"The note in question was given to plaintiffs for a debt due them from Banvard, one of the directors, and creates no liability in plaintiffs' hands against the corporation. *The directors acted without authority in making and ratifying the note, and it is, therefore, not the note of the corporation.*"

Upon the premises of the foregoing argument, the indebtedness created by the payment of the overdraft, in the present case, was the individual indebtedness of the President and Secretary, who were unauthorized to contract for the Company, and as the consideration is not shown to have inured to the benefit of the corporation, the directors were not empowered to promise, in the name of the Company, to pay it.

The doctrines of the law in regard to the ratification of acts, or contracts, of agents, are clearly stated by Mr. Justice Field, in delivering the opinion of the Supreme Court of California, in *McCracken* v. *City of San Francisco*, (16 Cal., 624,) and the opinion of this Court in *Marsh* v. *Fulton County*, (10 Wall., 684.)

The learned Judge said:

"To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given.

"It follows from the general doctrine that a ratification can only be made when the principal possesses at the time

the power to do the act ratified. *He must be able, at the time, to make the contract to which by his ratification he gives validity.* The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, *unless in a position to enter directly upon a similar transaction himself.*"

The question, therefore, is, had the directors of the plaintiff in error, at the time of the alleged ratification, power, under the charter, to pledge the credit of the Company for the payment of money borrowed for other purposes and uses than those of the corporation? Clearly they had not; and, if so, they were not empowered to ratify the act of the unathorized agents of the Company in borrowing money, though on its credit, for such purposes and uses.

The question in this relation is exclusively one of *power*, as between the directors and their principal, the corporation.

Where money is borrowed, directly, in the first instance, by directors, on the credit of the corporation, the lender in good faith is no doubt protected against an improper use of the funds received by the directors; but this is upon equitable doctrines, which have no application where the loan is originally made to agents who have no authority in law or fact to contract a loan for the corporation, and the lender, as here, is relying solely on a subsequent ratification, by directors, of the originally unauthorized transaction.

In such a case as the supposed ratification is the first proceeding by which the directors become a party to the transaction, the lender is bound to show, before the ratification can avail him, that the actual transaction, just as it occurred, was one which the directors would have been duly authorized to enter into on behalf of the corporation.

3. It has been assumed, in the preceding argument, that the money, though borrowed by unauthorized persons, was

loaned on the credit of the corporation. But, as has been said, the latter fact is not found by the Circuit Court. The fact that the overdraft was upon checks signed by the officers, does not necessarily show that the money was advanced for and on account of the corporation.

Judge Story says:

"A ratification can only be effectual between the parties when the act is done by the agent, avowedly for or on account of his principal, and not when it is done for or on account of the agent himself, or some third person." (Story on Agency, sec. 251*a*.)

Fourth.

But if the directors of the plaintiff in error had the power to ratify the action of its President and Secretary, in making this overdraft and borrowing the money sought to be recovered, in this case, the pretended ratification of their action by the passage of the resolution of June 21, 1877, authorizing the execution of the note in suit, was ineffectual for any purpose, for the reason that the persons who passed that resolution, as directors of the plaintiff in error, were not, at that time, its directors, and were incapable of acting as such; and their resolution, therefore, was void, and could have no effect to bind the Company.

This proposition involves two questions:

First. As to when the judgment of the District Court of the State, in the suit, referred to in the 6th and 7th findings, to remove these persons from office as directors of the plaintiff in error, operated to oust them from that office, or, in other words, when that judgment took effect; whether from and on the 21st of June, 1877, when it was drawn up, signed, dated, and announced, and, as we maintain, rendered, by the Court; or from the 22d of June, when it was filed with the Clerk.

Second. As to the operation of the judgment upon its

rendition, and its effect upon the directors, their official authority, and pretended official acts.

These questions will be considered in their order.

1. It is respectfully submitted that the learned Justice, who delivered the opinion of the Court below, erred in holding that the judgment of ouster pronounced by the Nineteenth District Court against the persons who purported to ratify the unauthorized action of the officers of the Mining Company in regard to the overdraft, did not take effect until the 22d of June, 1877, the day after the pretended ratification.

The facts, as found by the Court below, are these:

At 11 o'clock, on the morning of the 21st of June, 1877, the Court *announced a decision* to the effect that the persons named should be ousted from office as directors of the plaintiff in error, and that the election under which they acted, as such, was invalid and void; that, at the time this decision was so announced, the Court's *findings of fact*, and its *judgment thereon*, (in conformity to the decision,) were *reduced to writing, and were dated of the 21st of June;* that the findings and judgment, however, were not filed with the Clerk of the Court until the next day (June 22, 1877); that the judgment was recorded by the Clerk on the last-mentioned day; and that at the time the resolution was adopted, pretending to ratify the overdraft, the parties had notice of the decision of the District Court.

(A) It is maintained that, upon this state of facts, the judgment of ouster must be deemed to have been effectually rendered on the day it was formally drawn up, dated, and finally pronounced from the Bench, and that it operated from that day to remove the defendants from the office of directors of the plaintiff in error.

The filing of the judgment with the Clerk was a mere ministerial act of the Judge, which it was not necessary

to perform on the day it was pronounced, in order to give effect to the judgment, as a judicial act, as of that day.

The judgment, when filed with and by the Clerk, exhibited, on its face, the day of its date; and its pronouncement, on that day, was all that was necessary to give it immediate effect and operation.

To hold otherwise, would manifestly be to subordinate the principal to the incident---to subject the great *judicial act* of the Court to the control of the merest *ministerial act* in the case.

That the Court intended to finally dispose of the case, and determine the rights of the parties, on the day the decision was announced and judgment reduced to its legal written form, is clear; and it would certainly seem that due effect should be given to the intention of the Court, and that the judgment should have its legitimate operation from the day of its date.

When the judgment was filed with the Clerk, it became a record of the Court; but its date as a record, is not the day of filing, but the day it was pronounced in open Court, and that day and date is shown on the face of the judgment itself.

The date of the rendition of the judgment, is thus proved by the judgment itself, as filed with and by the Clerk.

It is not necessary, therefore, to go beyond or outside of the record to establish the actual date of the judgment.

When the judgment is produced, it shows, on its face, the day of its date. It proves itself, and proves its date, when exhibited.

When the judgment is filed with and by the clerk, what does it show upon its face? It clearly shows that *on the 21st day of June*, 1877, the Court ordered, adjudged, and decreed that the defendants be, and they are hereby, ousted and removed from office as directors, &c. This decree is, therefore, made on the *21st of June*, as appears on the face of the judgment when filed; and certainly the decree

should have effect on the day it is thus shown to have been actually made by the Court.

The filing and recording of the judgment were merely ministerial acts to perpetuate the evidence of the decree contained in it.

The suggestion that before the judgment was filed the Judge of the Court could change or modify it in any and all particulars, does not seem controlling or conclusive upon this subject.

That power existed even after the judgment was filed and recorded, during the remainder of the term of the Court.

It has been said that the power of a Court over its judgments, in civil cases, during the entire term in which they are rendered, is unlimited. Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out. (Freeman on Judgments, *sec.* 90; Noonan *v.* Bradley, 12 Wall., 129; Bassett *v.* U. S., 9 Wall., 38; *Ex parte* Lange, 18 Wall., 167.)

The present judgment was not stricken out or modified, by the Court, during the term, and is to be deemed to have taken effect, as we submit, when it was in fact pronounced.

The parties are deemed to be in Court during the pendency of the case, and cognizant of every order or judgment in the cause; and besides, it is expressly found here that the defendants had actual knowledge of the decision pronounced, on the 21st of June, 1877, in open Court.

(B) There appears to be nothing in the provisions of the statutory law of California, as we understand them, which requires that effect shall be given to such a judgment as this only from the date of filing it with the Clerk.

Sections 632 and 633 of the *Code of Civil Procedure* provide for the ordinary case where the judgment is left to

be prepared and entered by the clerk after the filing of the findings of fact and conclusions of law, according to the decision of the Court, and where the filing of the findings of fact and conclusions of law precedes the entry of the judgment by the Clerk.

In that case there is no formal decree until the Clerk has entered a judgment according to the decision.

But in a case where, as here, the judgment is drawn up by the Judge of the Court himself, pursuant to his decision, and actually pronounced from the Bench, there appears to be nothing in the statute which postpones the effect of the decree until it is filed with the Clerk of the Court, or recorded by him.

The decisions of the Supreme Court of California have not given any narrow, or constrained, effect to the provisions of the Code in respect to this subject of judgments.

In *Casement* v. *Ringgold*, (28 Cal., 335,) the Court decided that it was not necessary to the validity and effect of a judgment that it should be entered, at the same term, in the "Judgment Book." The entry in that book was held to be a ministerial act of the Clerk.

In *Genella* v. *Relyea*, (32 Cal., 159,) the question was as to a judgment *announced by the Court*, but not actually drawn up in the form in which it was designed to be entered, signed by the Judge, or filed by the Clerk, until nearly a month after it was announced.

Sawyer, J., said:

"The Court announced its decision, and the order for judgment was entered in the minutes of the Court on the 15th of August, 1865. The judgment was, therefore, *rendered*, and the time for taking an appeal commenced to run on that day."

Mr. Freeman, referring to this case, says that the language used in the opinion of the Court, though not abso-

lutely necessary to the decision, is worthy of citation, as founded on reason. (Freeman on Judgments, sec. 40.)

In *Franklin* v. *Merida*, (50 Cal., 289,) the question was whether a judgment was *rendered* October 2, 1869, when the Court simply made an *order* for judgment in favor of plaintiff, and it was entered by the Clerk in his book of minutes.

Nothing further was done by the Clerk until the 1st of October, 1874, when he entered up and recorded a formal judgment.

The Supreme Court said that the judgment was rendered on the 2d of October, 1869.

In that case there was nothing but an *order* for judgment, which was not formulated until five years afterward; and yet the *date of the order* was held to be the date of the *rendition* of the judgment.

It would certainly seem, under these adjudications, that the date of a judgment formally drawn up by the Court, in conformity to a decision actually and publicly announced by the Court, is to be deemed the date of its rendition as respects the immediate parties to the suit.

The filing with and by the Clerk, and the recording or entry of the judgment in the "Judgment Book," were only ministerial acts, which might well occur after the due rendition of the judgment, and were not essential to its validity and operation on the day it was actually pronounced.

(c) The general principles of law governing the time when a judgment is to be deemed perfect, and complete, and binding between the parties, are stated by Mr. Freeman in his standard Treatise on *Judgments*, (section 38,) as follows:

"Expressions occasionally find their way into reports and text-books, indicating that the *entry* is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing of matters

of evidence, and applying the general rule that in each case the best testimony which is capable of being produced, must be received, to the exclusion of every means of proof less satisfactory, and less authentic. *The rendition of a judgment is a judicial act;* its entry upon the record is merely *ministerial.* A judgment is not what is *entered,* but what is *ordered and considered.* The entry may express more or less than was directed by the Court, or *it may be neglected altogether;* yet, in neither of these cases, is the judgment of the Court any less *its* judgment than though it was accurately entered. In the very nature of things, the act must be perfect before its history can be so, and the imperfection or neglect of its history fails to modify or obliterate the act. *That which the Court performs judicially, or orders to be performed, is not to be avoided by the action, or want of action, of the Judges or other officers of the Court in their ministerial capacity.* In the case of judgments they must *first* be entered upon the record before they are admissible as evidence in other Courts. For this purpose they are not otherwise perfect."

The authorities sustain the position of this learned author.

The case of *Town of Huntington* v. *Town of Charlotte,* (15 Vt., 46,) is in point on this subject. In that case a decree of divorce was rendered in 1816, and there was nothing but a docket minute to show it. The decree was not recorded till 1823. One of the parties married, in the meantime, and a child was born of the marriage before the decree was recorded. The question arose as to the validity of this marriage. The Court held that the decree took effect upon its actual rendition, and that the marriage was valid.

It does not appear, in that case, that the decree was even formally drawn up, or signed, when rendered. On the contrary, as we understand the report, there was nothing but a docket minute to show when it was rendered.

The Supreme Court of Vermont said:

"It is further insisted that the decree only took effect from the time it was recorded. To adopt such a construc-

tion would weaken the force and effect of judgments, and throw numberless embarrassments around judicial proceedings. A judgment must of necessity take effect from the time it is *rendered*, and not from the time it is recorded; for otherwise its efficacy would be made to depend upon the action of a functionary who had nothing to do with its rendition, and who by law is vested with no power or authority, but the mere ministerial duty of enrolling it. And this duty could not always be performed upon the instant of rendering the judgment. To adopt the rule contended for would, in numerous instances, subject the efficacy of a judgment to the law of necessity, to the happening of accidental circumstances, and to the will and caprice of a ministerial officer. The decree, for all the purposes intended, was good when it was passed, and the record when made up had relation back to the passing of the decree."

In the case of *Davis* v. *Shaver*, (Phillips, Law, N. C., 18,) an entry of the word "*judgt*," on the trial docket, made in the Supreme Court, in open Court, was held to be an entry of a regular judgment.

Reade, J., said:

"A judgment is not what may be *entered*, but it is what is *considered and delivered* by the Court. The entry is a memorial of what the judgment was. If there had been no entry at all, it would have been competent for his Honor to have entered it *nunc pro tunc*, upon his being satisfied that judgment was in fact delivered. The entry, "*judgt*," was a note or memorandum of what the judgment of the Court was, from which the Clerk should enter the judgment in form after Court."

It is respectfully maintained, upon these authorities, that the correct rule is that where the Court has performed all the judicial acts required to make a judgment, and nothing remains to be done but ministerial acts of the judge, or other officers of the Court, in filing and recording the same, the judgment is complete and binding from that time. As Mr. Freeman says, "that which the Court performs judicially, or orders to be performed, is not to be

avoided by the action, or want of action, of the judges or other officers of the Court in their ministerial capacity."

2. The judgment of ouster was self-executing, and upon its rendition, on the 21st of June, 1877, the directors were actually ousted and excluded from office, and their pretended official acts thereafter were null and void.

(A) The principle is thus stated by Mr. High:

"The effect of a judgment of ouster upon the officer himself, where the information is brought to test the right of usurping an office, is to constitute a full and complete amotion from the office, and to render null and void all pretended official acts of the officer after such judgment, and the party thus amoved is entirely divested of all official authority, and excluded from the office as long as the judgment remains in force." (High on Extraordinary Legal Remedies, sec. 756.)

See, also, as sustaining the text:

King *v.* Serle, 8 Mod. Rep., 332.
State *v.* Johnson, 40 Ga., 104.

Judge Dillon says:

"If the amotion be *legal and authorized*, the office becomes *ipso facto* vacant from the time the amotion is declared. If the removed officer afterward continue to act, he is a mere usurper, and may be ousted on *quo warranto* and punished." (1 Dillon Munip. Corps., 3d ed., sec. 256.)

A judgment of ouster, in the case of a corporate office, is self-executing, and operates at once to exclude the officer, or board, from office; and an execution on the judgment is not necessary to oust the defendant, or to put the prevailing party into possession.

Welch *v.* Cook, 7 How. Pr. R., 286.
People *v.* Conover, 6 Abb. Pr. R., 222.
People ex rel. Crane *v.* Ryder, 16 Barb., 370.
Comm. *v.* Fowler, 11 Mass., 338.
2 Potter on Corps., sec. 740.

After judgment of ouster, the color of authority is determined, and the officers cannot be regarded as officers *de facto*, and their acts, therefore, are null and void.

Petition of Town of Portsmouth, 19 N. H., 117.

(B) The doctrine is applicable as well to officers of private corporations as to public officers. In *Angell and Ames on Corporations*, (sec. 430,) the principle is applied to cases of amotion from office in private corporations. It is there said:

"If the amotion is legal, it will not invalidate any act which the corporators may have previously done, or in which he may have concurred; but from the moment of amotion his official authority *ipso facto* ceases, and another may be elected into the vacant place. Should the person amoved continue to act, he is a mere usurper, without color of title, unless it is acquired by length of time; he may be ousted in *quo warranto*, and punished for the usurpation; and all corporate acts in which he has concurred are equally void as though he had never been elected."

(C) It has been decided that after a judgment of ouster, in a direct proceeding to determine the title of officers *de facto*, the color of authority ceases; and this without regard to whether anybody else has been inducted into the office or not.

Rochester & Genesee Valley R. R. *v.* Clarke Nat. Bank, 60 Barb., 249.

It is well said in that case:

"As officers *de facto* there must be at least presumption that they are rightfully in office. Such presumption cannot be said to exist after the decision of a competent tribunal to the contrary. To hold that persons who, according to the decision of the Court having jurisdiction to decide so as to bind the parties and the public, are mere usurpers, may still exercise the powers and discharge the duties of the usurper's office, is to deprive the judgment of ouster of all force and effect."

(D) No question as to the effect of an appeal from such a judgment arises in this case, as no appeal was taken until the next day after the pretended acts of the deposed directors, the validity of which has been considered, and no stay of proceedings was then allowed by the Court. (7th Finding, Rec., p. 18.)

Besides, it is well settled that the stay of proceedings provided by the Statute on perfected appeals, is confined to proceedings *in the suit, in the Court below*, upon the judgment or order appealed from. An appeal does not affect the operation of the judgment of ouster, which is self-executing and conclusive until reversed. (Code of Procedure, sec. 940; Welch *v.* Cook, 7 How. Pr. R., 287, *et cases cited.*)

Fifth.

It is respectfully submitted that the judgment of the Circuit Court should be reversed, and judgment should be directed to be entered, upon the findings, for the plaintiff in error.

J. HUBLEY ASHTON,
STEWART, VANCLIEF & HERRIN,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

No. 78.

THE MAHONEY MINING COMPANY, Plaintiff in Error,

vs.

THE ANGLO-CALIFORNIAN BANK (Limited).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 78.

THE MAHONEY MINING CO., PLAINTIFF IN ERROR,

vs.

THE ANGLO-CALIFORNIAN BANK, DEFENDANT IN ERROR.

When the brief of our associate, Mr. Theodore Sutro, was prepared, that of the attorneys of plaintiff in error had not been filed. We therefore present this additional brief, which will be mainly devoted to such points in the brief for plaintiff in error as have not been anticipated and answered by that of our associate.

THE FACTS.

The findings of facts by the court show that the moneys of plaintiff in error were, from the date of its organization, December 22, 1873, to June 22, 1877, from time to time deposited with the defendant in error, as treasurer of the former; that during these years checks were drawn from time to time by the president and secretary of the plaintiff in error, upon which moneys were drawn, resulting in an overdraft of the money in question. (Record, p. 18.) The plain substance of this is, that the plaintiff in error deposited money with defendant in error, and the president and cashier of the former from time to time drew checks, which were paid until the amount checked out was

in excess, by the sum in controversy, of the amount deposited.

There can be no doubt that the mining company had the right to procure money by the usual methods for the purposes of its business.

Section 303 of the Civil Code of California provides:

"Every corporation, as such, has power— * * * *
"6. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

This authorizes the procuring of money, whether in the form of a direct loan in the usual way, or by means of an overdraft, which is not unusual.

It is true that, by the California code, (sec. 305,) the corporate powers, business, &c., must be "exercised, conducted, and controlled by a board of directors;" but it is equally true, and thoroughly settled in law, that the power to make loans, to give notes, to draw checks, &c., may be delegated to the officers of the board, or to such agents as the board may select.

It was so expressly held in *Ridgway* v. *Farmers' Bank*, 13 Serg. and Rawle, 265.

Now, if in this case the president and secretary had authority from the board to manage the finances of the mining company, or if they without authority drew these checks and applied the money to the uses of the mining company, the liability of the latter cannot legally be disputed.

The plaintiff in error insists that, in the absence of proof of express authority, this court should presume:

1st. That the president and secretary had no authority to draw these checks;

2d. That the mining company did not get the money; and

3d. Asserts that authority could only be granted by the by-laws, or by special resolution or vote of the directors or stockholders of the mining company.

We submit that none of these propositions are sound. We, on the contrary, claim:

1st. That from the facts found the court must presume that the president and secretary had authority from the board to draw checks and receive the money on behalf of the corporation.

2d. That from the facts found the court must presume that the mining company received the money in question.

3d. That the company, having authority to procure money for its business, and it having been shown that the president and secretary had drawn checks for years, the *onus* of proving that they had no authority rested upon the plaintiff, as did also the *onus* of proving that the money was not applied to the uses of the plaintiff in error.

4th. That it was not necessary that there shall be a by-law or resolution or vote of the board to enable the president and secretary to act in the premises. That authority could be conferred in any mode by which an agency can be created, and can be proven just as any other agency can be proven, and was proven in this case by the long-continued practice of the president and secretary, as shown by the findings of the court.

In support of these propositions we refer to the following authorities:

In the *Bank of the United States* v. *Dandridge*, 12 Wheat., 64, the court uses this language:

"By the general rules of evidence presumptions are continually made, in cases of private persons, of acts even

5. Where the secretary of an incorporated company confines himself to the business of the company, and there is *no evidence that he extended it beyond its legitimate sphere*, it is right *to infer that money borrowed by him in the name of the company, under authority given by the directors, was destined for the appropriate use of the company.*

6. If the money was in fact obtained for an illegal purpose, or was misapplied, *the onus of proving it should devolve upon the corporation.*

See also *Gas Co.* v. *San Francisco*, 9 Cal., 453, from which we hereafter quote.

That officers are presumed, in the absence of countervailing proof, to have acted honestly—to have discharged official duty and the like—see the cases fully collected in 1 Phillips on Evidence, 5th Am. ed., Cow. & Hill's notes, side p. 504 *et seq.* The author says (p. 205), after citing authorities as to official acts: "Transactions of a private or unofficial character are interpreted by the same lenient rules of presumption. Dishonesty and *mala fides* are never presumed."

Neither Resolution nor By-law Necessary.

In Ridgway *v.* Farmers' Bank, 12 Serg. & Rawle, 256, it is expressly held that it is not necessary that authority should be given by a resolution of the board of directors entered upon the minutes; that the power may be given directly or indirectly.

See also Life & Fire Ins. Co. *v.* Mechanics' Fire Ins. Co., 7 Wend., 31.
Safford *v.* Wyckoff, 4 Hill, 445.
Merchants' Bank *v.* New York & New Haven Railroad Co., 13 N. Y., 599.
1 Parsons on Contracts, 44.
Farmers' Bank *v.* Butchers' Bank, 16 N.Y., 125.

Applying the doctrines of these cases to the case at bar, we submit that they afford a complete answer to the propositions contended for by the plaintiff in error. As we have seen, the law under which the mining company is organized confers upon the corporation the power to borrow money; the directors have the power to manage its affairs; they could, by resolution, delegate the authority to do what was done in this case, or they could do so without resolution or by-law, and without any formal action; and as these officers had continuously for nearly four years deposited and checked, it must be presumed that they had authority to do so. It will be presumed that the board had authorized just what was done.

[The brief of the plaintiff in error is not accurate in saying that there was no resolution. The finding is not that there was no such resolution; it was that none was "*shown;*" but although none was "shown," it must be *presumed* that such a one existed.]

We submit that the above authorities establish the following propositions:

1st. That authority by by-law or resolution to the president and secretary to borrow or check was not necessary.

2d. That such power will be presumed to have been given under the facts found in this case.

3d. That these officers will be presumed to have done their duty; that the court will presume that they were honest and applied the money to the use of the company, and not that they were dishonest and kept it.

4th. That the *onus* is upon the plaintiff in error to prove to the contrary of the above, and there is neither proof nor finding to the contrary.

If these propositions are sound in law, then the question whether the acts of the president and secretary were properly ratified or not becomes unimportant; because if the mining company actually received the money in question, or must be presumed to have done so, which is the same

thing, then upon the money count in the complaint the defendant in error can recover, even though, when the note in suit was executed, the directors were out of office and had no power to cause it to be executed, or to do any act whatever. If the corporation received the money, no ratification was necessary. Its liability is fixed by the receipt of the money.

Green's Ultra Vires, pp. 373, 374, 375.

Lowe *v.* London and Northwestern R. W. Co., 18 Q. B., 632.

Pauling *v.* London and Northwestern R. W. Co., 8 Ex., p. 867.

"On the other hand," says Green, (Ultra Vires, p. 375,) the liability of the person who has received from a corporation, under an informal contract, the consideration thereof, to pay for the same seems fully established in all circumstances."

"Where the contract has been executed and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it. It will be *presumed*, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them without authority have been ratified."

Gas Co. *v.* San Francisco, 9 Cal., 453.

But we also contend that the mining company has been made liable by

RATIFICATION.

After these overdrafts were made the board of directors ratified what had been done, and ordered the note in suit to be executed.

Our associate has fully discussed in his brief the question of the power of the board, in view of the action of the court touching the legality of their election, to ratify, and as to that feature of the case we rest upon his argument.

We think he has demonstrated that the board was still in existence lawfully. It was certainly the board of directors *de facto*. It had the lawful authority to manage the affairs of this corporation, and upon the authorities above cited it must be presumed, until the contrary is shown, that it discharged its duty. When, therefore, it ordered the note in suit to be executed, it must be presumed that it knew that this money was procured for the use of the corporation; that the corporation received the benefit of it; that the bank acted in good faith; that the president and secretary acted in good faith and pursuant to authority,—these are the legal inferences from the act of the directors, which must be overthrown by evidence from the mining company, the existence of which evidence is in no way indicated by the record in this case.

To presume otherwise would be to presume *dishonesty* and require proof of integrity; to presume guilt, and demand of the accused to *prove innocence*.

That it is within the power of a corporation to ratify acts done for the corporation within the scope of the corporate powers, and thereby make them the acts of the corporation, will hardly be controverted.

See Olcott *v.* Tioga R. R. Co., 27 N. Y., 546; Moss *v.* Averill, 10 N. Y., 449; and cases cited in note on p. 464, Green's Ultra Vires.

We are not contending that the directors could ratify and make the act of the corporation something that had been done beyond the powers of the corporation, or that had no relation to the corporate business; but we do contend that the acts in question were within the corporate powers, and the money was procured for corporate purposes, and hence, whether authority had previously been given to the president and secretary or not, the directors could ratify their acts.

The case cited by plaintiff in error of Hall *v.* Auburn

Turnpike Co., 27 Cal., 257, is one in which the note had been given for an individual debt that had no relation whatever to the affairs of the corporation. These were the undisputed facts of the case, and the court very properly held that the directors could not make it the debt of the corporation.

To bring the case at bar within the principle of that case and the others cited, counsel are compelled to assume as a fixed fact that the president and secretary used the money on their own account, and that the corporation had no benefit from it whatever. They treat it as the debt of the president and secretary; whereas, by every legal presumption that can arise in this case, it was money procured for and used by the mining company; and the directors at the time they directed the note to be given must be taken to have inquired and ascertained that, in fact, the money was so procured and applied.

We ask that the judgment be affirmed.

SHELLABARGER & WILSON,
Att'ys of Def't in Error.

OFFICE SUPREME COURT U. S.
FILED
OCT 26 1887
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 324.

THE MAHONEY MINING COMPANY,

Plaintiff in Error,

vs.

THE ANGLO-CALIFORNIAN BANK (Limited),

Defendant in Error.

In Error to the Circuit Court of the United States for the District of California.

Brief for Defendant in Error.

THEO. SUTRO,
Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 324.

THE MAHONEY MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE ANGLO-CALIFORNIAN BANK (Limited),
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of California.

BRIEF FOR DEFENDANT IN ERROR.

(This case is reported in 5 Sawyer 255.)

Statement of the questions of law involved in this case.

1. When directors of a corporation have been elected by an election which is afterwards decreed by a court to have been illegal and void, are such directors capable of binding the corporation, previous to such decree, in all matters legitimately devolving upon directors of the company?

2. Does an order made in a suit, restraining directors of a corporation from acting as such, impair the efficiency

of their action with a third party (not a party to the suit) in disobedience of said order?

3. When a decision in an equity suit is announced orally by the court, on a certain day, and the findings and decree of the court, carrying this decision into effect, are prepared and dated the same day, but are not filed with the clerk and entered of record until the following day, on which day does the decision take effect?

STATUTES OF THE STATE OF CALIFORNIA BEARING UPON THIS CASE, IN FORCE JUNE 21, 1877, THE DATE OF THE ORAL DECISION HEREIN:

Section 10632 California Code of Civil Procedure: —Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

Section 10633:—In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

Part of Section 10684 (which corresponds to section 1241, New York Code of Civil Procedure):—When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; * * * when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

BRIEF.

I.

As to the first question:

Until directors of a corporation are ousted from their office by the final decree of a court of competent jurisdiction, they are *de facto* officers holding under color of an election, and having charge of the affairs of the company, and are capable of binding it in all matters legitimately devolving upon directors of the company.

Baird *v.* Bank of Washington, 11 Sergt. & Rawle, 411.

Del. & H. Canal Co. *v.* Pa. Coal Co., 21 Pa. State, 131 (146).

Angell & Ames on Corporation (10th Ed.), §§ 286 and 287, and cases there cited.

II.

As to the second question:

An order in a suit affects only the inmediate parties to it.

Sage *v.* Quay, * 347.

Edmonston *v.* McLoud, 19 Barb., 356 (361).

2 Wait's Practice, 62, and cases there cited.

Story Eq. Jurisprudence (11th Ed.), § 891 *b*.

III.

As to the third question:

Point 1.

It appears, from the history of legislation and judicial procedure, that the object of the statutes requiring deci-

sions of courts to be in writing, and the filing and recording of papers, was to bring precision into the lax method, which was in vogue in ancient times, of holding persons to oral decisions of courts, the exact nature of which could not afterwards be proved.

Point 2.

A judgment or decree in equity cases can only be enforced by punishing disobedience, as for a contempt *after service of a certified copy of the decree on parties.* Therefore, how can parties be said to be bound by it until the time begins, when they may be punished for disobeying it?

Section 10684 California Code (see corresponding section 1241 of the New York Code of Civil Procedure).

Fero *v.* Van Evra, 9 How. Pr., 148.

But it is essential to the *validity of a judgment* that it be rendered by a court of competent jurisdiction at the time and place, and in the *form* prescribed by law. A judgment cannot be entered on a mere oral decision of the court.

Wicks *v.* Ludwig, 9 Cal., 173.
Boker *v.* Bronson, 5 Blatch., 5.
Burger *v.* Baker, 4 Abb. Pr., 11 (13).

Point 3.

Section 10632 California Code of Civil Procedure requires the decision to be given in writing and filed. What is a decision? Definition: A decision is the statement of facts found, and the conclusions of law therefrom.

Coveny *v.* Hale, 49 Cal., 552 (555).

The distinction between a mere opinion and a decision, which latter is immediately entered of record, must be kept in view.

Houston *v.* Williams, 13 Cal., 24 (27).

Even a written opinion giving judgment for a party is not a *decision;* the decision mentioned in Section 1022 New York Code of Civil Procedure (which corresponds to Section 10633 California Code) defined: A separate statement of facts and of the conclusions of law, and a direction for entry of judgment thereupon, are essential.

Weyman v. *Nat. B'way Bank, 59 How. Pr., 331,* and cases there cited.
Putnam *v.* Crombie, 34 Barb., 232 (237).
Sands *v.* Church, 6 New York, 347 (356).
Ragan *v.* McCoy, 26 Mo., 166.
Bates *v.* Bower, 17 Mo., 550.

Point 4.

Until *such a decision is signed and filed* the cause is not removed from the authority of the trial court; and although the justice may have signed and delivered his opinion stating the facts and conclusions and the judgment that should be entered, other and different findings and conclusions may properly be made, and a different judgment be directed from that stated to be proper in the opinion. (Compare Section 1010 N. Y. Code.).

Adams v. *Nellis, 59 How. Pr., 385*
Thomas. v. *Tanner, 14 How. Pr., 426.*
Hughes v. *Washington, 65 Ill., 245.*
Ayrault *v.* Sackett, 17 How. Pr., 507.
Doggett *v.* Emerson, 1 Woodbury & Minot, U. S., 1.
Gibson *v.* Crehore, 5 Pick., 146 (157).

In California when a trial is had by the Court, the decision must be filed or the judgment cannot stand. Until the decision is filed, the case has not been tried. The cases in California which have held that the provision in Section 10632 California Code, as to the

decision of the judge being in writing, and filed within thirty days, is merely directory, had reference only *to the time* within which the filing must take place.

Carpentier *v.* Thurston, 30 Cal., 123.
Hastings *v.* Hastings, 31 Cal., 95 (98).
Russel *v.* Amador, 2 Cal., 305.

A decision of a court is not a judgment until in some form it has been entered of record.

U. S. v. *Garcia, 1 Sawyer, 383.*
U. S. *v.* Gomez, 1 Wallace, 690 (699).

Section 10633 California Code requiring filing of separate findings of facts and conclusions of law, etc., is mandatory; no decision can be said to have been rendered until they are so filed; the decision of a judge and report of a referee are precisely analogous in character. It must appear affirmatively that the facts support the judgment. After filing findings of fact, the court cannot re-examine the facts and reverse its former decision. The object of the section is to do away with implied findings according to the California Statute of 1861.

A decision or judgment is not to be considered as final until the filing of findings. The cases in California decided between May 20th, 1861, and March 11th, 1872, which hold *contra*, were all based on the act of May 20th, 1861, which has been repealed by the Code of Civil Procedure.

Dowd v. *Clarke, 51 Cal., 263.*
Northern Pacific R. R. v. *Reynolds, 50 Cal., 90 (93).*
McKeon *v.* McDermott, 22 Cal., 667 (669).
Prince *v.* Lynch, 38 Cal., 528 (530).
Hoagland *v.* Clary, 2 Cal., 474 (475).
Harston's California Practice, page 277.

(The attention of the Court is particularly directed to the cases in the foregoing brief, printed in italics).

The judgment of the Circuit Court should be affirmed.

THEO. SUTRO,

Of Counsel for Defendant in Error.

OFFICE SUPREME COURT U. S.
FILED
OCT 31 1901
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 78.

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vs.

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Defendant in Error.

In Error to the Circuit Court of the United States for the District of California.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

THEO. SUTRO,
Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 78.

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PLAINTIFF IN ERROR,

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DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of California.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Not having seen the brief of plaintiff in error, at the time of writing the other brief filed herein, the following is intended as an additional exposition of the law covered by the *Fourth* subdivision of plaintiff in error's brief, beginning page 20, and more especially as an examination of the authorities cited in said portion of their brief by counsel for said plaintiff in error.

As to the other questions stated in the brief of counsel for plaintiff in error to arise on the findings of fact, they will be considered in detail in the brief of my colleagues herein. Some general considerations, however, may not

be out of place before proceeding to reply specifically to the third of the questions mentioned in plaintiff in error's brief, page 6:

As to the first question there mentioned, it must be remembered that the Secretary and President of the Mining Company had been in the habit of drawing checks for the Mining Company for the period of nearly three and a-half years, on the money deposited during the same period at various times with the Bank. (See 4th finding, Record, page 18, fol. 60; and opinion of Judge Field, Record, page 20, fol. 72.) During all this period the power of said officers to draw these checks went unchallenged by the Mining Company. After such length of time and acquiescence, the Mining Company is estopped from denying the authority of its agents to have drawn checks on its behalf. The President and Secretary of a corporation are not special agents delegated to do a special thing, but are general agents; and when held out by the sanction of the Company as empowered to do certain acts for any length of time, are impliedly clothed with authority to do these acts. See California Civil Code, Section 7317: "Ostensible authority is such as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess." The mere fact that in the course of these transactions with the Bank, these said officers overdrew the account of the Mining Company, does not impugn the views here expressed. If they had ostensible authority to draw checks on the actual cash deposit of the Company with the Bank, and act in general as its fiscal agents, they also had ostensible authority to draw in the accustomed way on the credit of the Company. Whether that was borrowing money for the Company or not is immaterial, as long as it was done through checks drawn in the form in which the said officers had been in the habit of doing it for a series of years past under the implied santion of their principal. Under these circumstances even an overdraft

cannot be considered out of the scope of the ostensible powers and duties of the agent. As regards the Bank it was justified, after so many years of similar dealing, in honoring the checks as those of the Mining Company. The contract as regards *them*, should receive an interpretation to make it binding on the Mining Company. The California Civil Code is specific on this point. Section 6643: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." This applies mainly to written contracts. But the principle holds good as well in regard to other contracts, and the checks may be looked upon as written contracts binding the drawer, under the well known usages of banking, to provide the funds paid out on the strength of such checks. It also appears from the findings, (Record, page 18, fol. 60), that the checks were signed by the President and Secretary *of the Mining Company*, and the monies *of the Mining Company* paid out on such its checks. (See also Record, page 20, fol. 72, opinion of Judge Field). (Morse on Banking, page 296, where the forms of checks to be held valid by a Bank are considered in detail.)

As to the point that after three and half years of similar transactions, the Mining Company should not be held to have had knowledge as to its agents ever having drawn any checks in its behalf, as long as that is not shown, is a proposition which needs only to be mentioned to fall to the ground. So also does the proposition (Brief plaintiff in error, page 14), that it ought to have been shown that the money was paid to the use of the Mining Company. That is implied as long as it was paid out to its agents clothed with authority to receive such money on its behalf. Moreover, that fact, as stated above, is substantially found in the 4th finding (Record, page 18, fol. 60).

As to the second question mentioned in brief of plaintiff in error, page 15, whether the Directors of the Mining Co.

had *power* to ratify the action of the President and Secretary, the main point relied upon seems to be that the credit on the overdraft was not given to the Company. It is insisted that it must be assumed that the *Company* did not receive it or that it was used for it; we have already shown that under the circumstances quite the contrary must be assumed. So it is also substantially found by Judge Field in the 4th finding and in his opinion, and also in the fact of judgment for the Bank when taken in connection with the prayer for judgment contained in its complaint (Record, page 3, fol. 3). Counsel for plaintiff in error insist throughout that the *Bank* ought to have known that the money paid on the overdraft "inured to the benefit of the Corporation". We hold that that is presumed from the nature of the contract and the implied authority, after years of usage, conferred by the Mining Co. on its agents, the president and secretary. Plaintiff in error, on the contrary, should have shown as a matter *of fact*, that the Bank knowingly paid the money for the benefit of individuals notoriously unauthorized to draw any money for account of the Mining Co.

No such finding and no such fact appear even in the remotest degree throughout the whole record. The Mining Co. was bound even without the subsequent ratification of the overdraft and the giving of the note in suit by the directors of the Mining Co. *After* such ratification the liability of the Mining Co. cannot any longer be reasonably questioned.

Without dwelling longer on these preliminary points raised by plaintiff in error, we will now consider more in detail the points raised by plaintiff in error on the question "whether the persons under whose resolution, on the 21st of June, 1877, the note in suit was executed, were at the time in office and capable of acting as directors of the Mining Co."

The *date* of the judgment (Brief Plaintiff in Error, page 22) is of no consequence, neither is the intention

of the judge; the intention cannot contravene the strict provisions of the code of practice. The important date can only be that on which the findings of fact *left the possession* of the judge, and the decision was thereby rendered. That was on the 22d of June. The mere dating of the judgment was an error, if at all, not of substance. It might have been corrected on the judge's own motion. He might have, by mistake, dated it ten years earlier or later. Will the plaintiff in error hold that in that case the date of the *judgment* ought to govern?

The case, Noonan *v.* Bradley, 12 Wall, 129, cited in brief of counsel for plaintiff in error, page 23, merely decides that the United States Supreme Court will not, on motion, review its own final judgments or decrees after expiration of the term at which they were rendered. The motion was to review judgment of this Court, given in the same case nearly ten years previous.

The next cases cited, Bassett *v.* U. S., 9 Wall, 38, and *Ex parte* Lange, 18 Wall, 167, are both criminal cases in which judgment of conviction on confession had been rendered against the prisoners. It was held that the Court could, during the *same term on motion*, for good cause shown, set aside a judgment. Although in the latter case it is also held that the power of the Court could not be used to violate the guarantee of personal rights found in the common law.

As to the reference to Freeman on Judgments, Sec. 90 merely reiterates the principle held in the foregoing and other cases of the right to have a judgment set aside upon a sufficient showing, during the same term, on a motion *made to the Court.* It is well settled that such a motion is not *ex parte*, but must be founded on affidavits and on notice to the other side.

These cases are therefore not in point in the present case, because we hold that until the judge had *filed* his decision (consisting of findings of fact and conclusions of law) no final decision had actually been made; and a motion to set it aside or modify it, would have been

premature. The judge might have altered his decision of his own motion before any steps had been taken for an application to that effect. The motion or application to set aside or modify could not have been made until the final decision (consisting of findings of fact, &c.), had passed from the custody of the judge and become part of the archives of the court. Whether entry of judgment or recording was necessary is not in point here. We hold that there *was no judgment* on the 21st of June, 1877, which *could* have been entered or recorded.

As to the extent of the power of the court to alter its judgment, it appears that in California, beyond a doubt, even upon motion, the court cannot re-examine and substitute different findings of fact, after it has once filed its findings. The cases cited in my other brief, on page 6, bottom, are to that effect. Prince *v.* Lynch, 38 Cal. 528, decided in 1869 (*while the practice of implied findings was still in vogue*) distinctly holds per SAWYER, C. J., that there is "no provision of the Practice Act, authorizing the Court to re-examine the evidence upon the motion of one of the parties after it has once filed its findings and rendered judgment, and on such re-examination to reverse its former action and substitute different findings of fact." * * * "If the judge should discover a clerical mistake in his findings and before the entry of judgment, he might correct it, provided it would not work to prevent the other side from moving for a new trial." But it appears from this whole decision that in matters of *substance* the findings of fact cannot be changed after having been filed.

Admitting that the Court might alter its *judgment* during *the same term*, the judgment being the conclusion of law drawn from the findings of fact, nevertheless the findings of fact would remain unchanged after having been once filed. But as under the Code findings of fact are absolutely essential as an integral part of a valid *decision*, it follows that so long as the findings of fact have not been *filed* and are therefore still in the hands of

the judge and capable of being *entirely* changed, no final decision can be said to have been rendered.

The judgment was not *in fact* rendered until the decision, consisting of the findings of fact and conclusions of law, was *handed to the Clerk*, as the judgment of the Court. It is a well known principle of law that the mere date of papers can always be explained or examined into.

In drawing the caption of a judgment the well known practice is to state the date at which it was actually *entered*. See Whitney *v.* Belden, 4 Paige, 139, where Chancellor Walworth says: "Where it is of any importance to either party that the true time of entering the order should appear, the date or caption of the order should be made to correspond with the time of its *actual entry or allowance* by the register." To the same effect Barclay *v.* Brown, 7 Paige, 245, per Walworth, Ch.: "The caption of a decree or order unless otherwise directed should be made to correspond with the time of the actual *entry* of the decree."

See also, 1 Barb. Chanc. Prac. 341, 2nd Edition: "Until a decree is settled and *entered*, it is considered only inchoate, and neither party can have any benefit from the decision until that time. * * * A decree is considered as entered from the *time it is left with* the register or clerk for that purpose, although from a press of business it may not actually be copied into the book of minutes, for some time afterwards."

In the case at bar it does not appear *where* the judge announced his decision. But a judge *as such* cannot give any judgment under the Code, (except judgment on a frivolous answer at Chambers), but it must be rendered by the Court—when sitting as such, and not by a judge at his lodgings, in the street, or even in Chambers. (See 1 Barb. Chan. Prac. 341, note 8, bottom of page), also Aymar *v.* Chase, 12 Barb. 301.

The next authority cited in brief of counsel for plaintiff in error is that on page 24, Casement *v.* Ringgold, 28 Cal. 335, July, 1865, (dissenting opinion by Curry, J.;)

Opinion by Sawyer, J.: "It appears from the record that the findings of fact and conclusions of law were *signed* by the judge *and filed* on the 24th day of September, 1864, and that formal judgment *was signed* by the judge on said day, and that the *same was filed with* and by the clerk of the Court before the final adjournment, but that the clerk did not enter the judgment in the judgment book, or make up the judgment roll till after the adjournment, and till action to vacate the judgment had been taken." * * * "It had become the final determination of the court. Nothing remained to be done, but the mere ministerial duty to be performed by the clerk of *copying it in the Judgment Book*."

This case merely decides that when a judgment is complete in every respect, except entry of a minute of it in the judgment book, it cannot be vacated *after* adjournment of term, on any new proceeding in the cause then begun.

The next case is that of Genella *v.* Relyea, 32 Cal. 159. Sawyer, J.: "The order for judgment herein was entered in the minutes of the Court on August 15, 1865. But the judgment was actually drawn up in the form in which it was designed to be entered, signed by the Judge, and filed by the clerk, on the 9th of September, 1865, and nothing remained to be done except the ministerial duty of *copying it in the Judgment Book*."

The Court holds that appeal was too late, as being over a year even from latter date.

In Wetherbee *v.* Dunn, 36 Cal. 252, (Oct. 1868) the Court refers to the foregoing case of Genella *v.* Relyea and other similar cases, and announces its decision to have meant that "the time within which an appeal must be taken, must be computed from the time the judgment is announced by the court and *entered in its minutes*, and not from the date of its entry in the judgment book by the clerk."

The language of Mr. Freeman in his Book on Judgments, Sec. 40, cited by counsel for plaintiff in error,

should be taken in connection with his preceding language in that Section. Mr. Freeman refers merely to the *entry* of the judgment in the judgment book when he speaks of *that* being a mere ministerial duty for the clerk; *filing* is absolutely essential.

In the next case in order, Franklin *v.* Merida, 50 Cal., 289, on the 2nd day of October, 1869, the court made the following order for judgment in favor of the plaintiff, *and it was entered by the clerk in his book of minutes of the court:* "This cause having been heretofore tried before the court without a jury, and submitted for consideration and discussion, it is now ordered that plaintiff in the cause have judgment against the defendants for possession of the premises described in the complaint, together with costs of suit." No further *entry* was made by the clerk until 1st of October, 1874, when he entered up and recorded a formal judgment. By the court: "The judgment was *rendered* October 2, 1869, and recorded October 1, 1874."

Neither this case nor either of the two cases of Casement *v.* Ringgold and Genella *v.* Relyea are in point, because in all of them there was some clear decision which *had passed from the possession of the judge* and become part of the records or archives of the *court*, and the judicial act had thereby been completed. Nevertheless, in all of these cases it was not essential to file findings of fact, as their decisions relate to the time between May 20, 1861, and March 11, 1872, when implied findings were in vogue. (See my other brief, page 6.)

The citation from Freeman on Judgments (Sec. 38) refers also to the mere *entry* of the judgment. It does not speak about *filing*. It appears from his whole work that the author takes it for granted that there must be *some entry* of the substance of the decision in the records of the court, or else some papers on file on the date on which the judgment is supposed to speak. In Sec. 39, end, he says: "Among the rules of the old system not abrogated by the new one, is the one that a decree pronounced by the court

and *reduced to writing* is admissible in evidence, independent of the fact of its enrollment or entry in the judgment book." In Sec. 61, when speaking of entering judgments *nunc pro tunc*, and of the evidence required to to show what judgment was *rendered*, he says: "An entry must somewhere be found and produced in court apparently made by the authority of the court. It must be in some book or record required to be kept by law in that court." Among competent evidence for that purpose he mentions: "the opinion of a judge in writing *filed* among the records in a case, if the law required it to be written and *filed*." —

Mr. Freeman's book, however, is very defective. He does not cite a single one of all the important cases in my brief printed in *italics*, in his edition of 1881.

The next case is Town of Huntington *v.* Town of Charlotte, 15 Vt. 46. (1843). As to answer to this, see opinion Field, J., Record, page 22, fol. 78. The supposition of counsel for plaintiff in error that in this case "there was nothing but a docket minute to show when it was rendered," is wholly without foundation in fact. On the contrary, the counsel in that case disclaiming the validity of the judgment proceeds upon the ground (p. 48) that it had not been signed by the judges and *enrolled*. The court in its opinion overrules this view and says that the duty of *enrolling* the judgment was merely ministerial. It says that the decree was good when it was "*passed*." What is the meaning of enroll and pass? To enroll means in the old chancery practice to engross the decree in proper form upon parchment rolls consisting of long slips of parchment, etc., all of which had to be done in a very precise manner, but yet was strictly clerical. (See 2 Daniell's Chancery Practice, 1018, 1024, 5th American edition.) All this was subsequent to *passing* the decree which was completed when the Register had "inserted his initials in the margin, at the foot of the last page, as an authority to the clerk of entries to enter it in the Registrar's books. * * * No

proceedings can be taken upon a decree or order not entered; and if any are taken they are irregular and voidable; even though the omission to enter the decree or order has been occasioned by the mistake of the entering clerk, and not through any neglect of the party." (2 Daniell's Chanc. Prac. 1018, 1024, 5th Am. Ed.)

It is clear therefore that the decree, when "passed," had not only been pronounced by the court but reduced to writing, settled and filed with the custodian of the records to be entered. The enrollment was a subsequent, merely formal, act as before stated, when the parchment rolls were left in the Public Record office in Roll's Yard, (2 Daniell, 1023.)

Next comes Davis *v.* Shaver. Phillips Law, North Carolina Rep. p. 18. This was an action of debt; the defendant allowed judgment to go by default, and it appeared from affidavits submitted on a motion to vacate said judgment, that it was "*entered* in open court," and by the clerk; "that the judgment was taken in accordance with the regular rules and practice of the Court" (*vide* opinion). The remarks of Reade, J., quoted by counsel for plaintiff in error, must be taken in connection with the foregoing and with what follows, viz.: "The entry 'Judgm't' was a note or memorandum of what the judgment of the Court was, from which the clerk should enter the judgment in form after court. And this is according to the course and practice of our courts."

This case therefore has no bearing whatever on the present question, because there was a mere judgment of default which required no elaborate decision, and was valid, though a mere minute, when taken in connection with the prayer of plaintiff's petition. The judgment had left the "breast" of the judge, and had become a part of the minutes or records of the Court.

Moreover, that was in accordance with the rules of the Revised Code of Practice of N. C., then in vogue. The *California* Code in the present instance must govern.

For an exhaustive judicial review of the practice on

this whole subject, the attention of the Court is especially directed to the case of Hughes *vs.* Washington, 65 Ill., 245, cited on page 5 of my other brief herein, which has all the more weight, because in Illinois the *filing* of the decision, in cases of trial by the court, is regulated by the common law practice, and is not peremptorily enjoined by a strict statutory provision, as it is in California, by section 10,632 of the Code of Civil Procedure.

We will now consider 2 of brief of plaintiff in error, page 28. The extract from High on Extraordinary Legal Remedies, refers only to municipal corporations; so do the two cases cited: King *v.* Serle, 8 Mod. Rep. 332. (1795). In this case a *mandamus* was refused on the ground that judgment of ouster had been given, and was still in vogue, on a *quo warranto* proceeding. In State *v.* Johnson, 40 Ga. 164, a rule for an attachment for contempt was refused on the ground that a judgment of ouster was still subsisting in a previous *quo warranto* proceeding.—In both these cases a judgment of ouster had actually been *rendered;* which we claim under the requirements of the California Code had not been done in the present case. In the case in Ga. it appears from the statement of facts that "the Court *passed* an order ousting Johnson from office." I have heretofore considered what *passing* a *judgment*, decree, or order meant. In the present case no decree had been *passed.*

The quotation from Dillon likewise refers to municipal corporations. It relates to cases where a public officer has been removed in the regular method prescribed in the charter of the corporation, *e. g.*, by the mayor after a full hearing.

Nevertheless, even in regard to those cases, in a foot note to that section, Judge Dillon says: "But if he is *permitted to act* after amotion, it would probably be considered in this country, that his acts would, as to third persons, be valid like those of officers *de facto.* * * *

In this country the acts of *de facto* officers are everywhere considered valid as respects the public."

The next cases, Welch *v.* Cook, 7 How. Pr. 286; People *v.* Cowan, 6 Abb. Pr. 222; People *v.* Ryder, 16 Barb. 370, all relate to actions brought against *public* officers for usurping public office.

In all these cases reference is made to sections of the New York Code of Procedure, and it is held that execution is not necessary to oust the usurper and place the claimant in office, on the ground that the Code provides distinct methods of procedure against such *public* officers and *fails to provide* for any such method of enforcing judgment.

The California Code corresponds nearly precisely to the New York Code in this respect.

But in both codes it is provided that in *ordinary* actions a certified copy of the judgment may be served on the party, etc. (§ 10684), and the judgment *enforced* by punishing disobedience as for a contempt. The *mere fact* of the action being against a private corporation does not alter the case. A corporation is in the eye of the law and under the *Codes* a mere person like any single individual. In Cal. the actions against public officers, to which all the cases and citations mentioned by counsel for plaintiff in error relate, are governed by the course of procedure described in Chapt. V of the Code of Civil Procedure. The first section thereof (§ 10802) abolishes the old *writs of scire facias, quo warranto* and information in the nature of *quo warranto* which were formerly used in such public actions brought in the name of the people against usurping public officers. These actions by said writs were *quasi* criminal actions. They have no bearing on the present case whatsover. Sec. 10809 of Cal. Code prescribes what the judgment in these actions in said Chapt. V mentioned, shall be. There is no such provision in relation to ordinary equitable actions against *private* persons, including of

course private corporations (§ 10017 of the Cal. Code: "the word person includes a corporation as well as a natural person.") In regard to the method of enforcing judgments against *private* persons, other than for money, etc., Sec. 10684, Cal. Code, must govern. And a certified copy of judgment certainly could not be served on the defendants until that judgment actually existed and had been handed down or *filed* by the judge.

The object of the citation of the case of Commonwealth *v.* Fowler, 11 Mass., 338, decided in 1814 under the old common law practice, is not apparent. The report merely gives the form of a judgment upon an information in nature of a *quo warranto* against a judge of probate who was charged with usurping that office. This form is of no account even against a public officer under the provisions of the Code. Its bearing as a precedent for judgment in an ordinary action for relief under the Code is all the more remote.

The Sec. 740 in Potter on Corporations, referred to in the brief of counsel for plaintiff in error, relates principally to municipal corporations, and wholly to amotion by vote of the corporators themselves, under special power conferred by statute. It in no way throws any light on the present case, which had to be a regular judgment in an action, governed by the method of procedure prescribed by a code. The Section is substantially the same as Sec. 256 of Dillon on Municipal Corporations, and refers to that portion of that work.

The case of Petition of Town of Portsmouth, 19 N. H., 117, was one in which the Court had re-examined the returns of election of a road commissioner (a public officer), and in the words of Wilcox, J., by its "final and efficient judgment," declared that he was not elected. That according to the common law procedure and *under the practice* of New Hampshire, determined his right to the office. But it undoubtedly was the regularly filed and entered judgment of the Court; it was at all events

its *final* judgment, which, according to the Cal. Code practice, was not so in the present case.

The Section 430, quoted from Angell & Ames on Corporations, relates merely to municipal corporations, and corresponds to the sections from Dillon and Potter, above explained, as to amotion of officers by a vote of the corporators, or by some special officer of the corporation, when that power has been conferred by law.

The case of Rochester and Genesee Valley R. R. *v.* Clarke Nat. Bank, 60 Barb. 249 (1871), although a case decided since the enactment of the N. Y. Code, relates to officers of a National Bank, which the City of Rochester had a right to elect. They were therefore *quasi* public officers. However all that that case decides, so far as reference thereto by counsel is concerned, is that the acts of officers *de facto* cannot be sustained "when even the color of authority" has "notoriously ceased." Talcott, J.: "We think when by a judgment of a court of last resort, in a direct proceeding, to determine the tittle of officers *de facto*, it has been *adjudged* that they have no rightful title to the office, but are mere usurpers, then at least as to all who have notice of such proceeding *and judgment*, the color of authority has ceased." That holds true in our case after the 22d of June, 1877, not the 21st of June, when no final judgment or decision existed.

"D.," page 30, brief of plaintiff in error. This point falls to the ground when, as we have shown, there was no "*judgment* of ouster" until June 22d. Whether the appeal then worked a stay as to the ousted directors or not, the acts on the strength of which the action in the lower court was brought, had been completed and were valid without the assistance of any stay of proceedings; although it looks somewhat like a contradiction in counsel to lay stress on the fact that no stay of proceedings *was allowed by the court* on June 22d, and then to say that a stay would have been wholly useless even on June 21st, on the ground that it could not have staid this judgment. This

is merely repeating in another guise that this judgment "executed itself," which position, under the practice of the Code, we have shown to be wholly untenable as to private corporations or individuals; even supposing that a *judgment had been rendered* on the *21st*, which also we have shown to have been, under the law and the circumstances, an impossibility.

THEO. SUTRO,

Of Counsel for Defendant in Error.

14-197

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~331~~ 85

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

CHRISTINA TREFZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED NOVEMBER 9, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 331.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

CHRISTINA TREFZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

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a . United States circuit court, district of New Jersey.

THE KNICKERBOCKER LIFE INSURANCE COMpany, plaintiff in error,
against
CHRISTINA TREFZ, DEFENDANT IN ERROR.

Certified copy of the record and proceedings had in the above entitled cause.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of New Jersey, greeting:

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court before you between Christina Trefz and The *the* Knickerbocker Life Insurance Company of New York, a manifest error hath happened, to the great damage of the said The Knickerbocker Life Insurance Company of New York, as by their complaint appears; we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and sev-
2 enty-eight, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws & customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] S. D. OLIPHANT, *Clerk.*

A. Q. KEASBEY & SONS, *Att'ys.*

A true copy.

[SEAL.] S. D. OLIPHANT, *Cl'k.*

NOV. 20, 1877.

(Indorsed:) 3-12. No. 23. S. T., 1876. Supreme Court of the United States. The Knickerbocker Life Insurance Co. of New York vs. Christina Trefz. Writ of error to the U. S. circuit court for the district of New Jersey. Ret'ble 2nd Monday of Oct., 1877. A. Q. Keasbey & Sons, att'ys of plt'ff in error, Newark, N. J.

Allowed.

JNO. T. NIXON, *J.*

Filed Nov. 20, 1877.

S. D. OLIPHANT, *Clerk.*

85 cts. Copy filed.

REC. 331—1

3 UNITED STATES OF AMERICA, *ss*:

To Christina Trefz, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein The Knickerbocker Life Insurance Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

JNO. T. NIXON, *J.*

(Indorsed:) U. S. Supreme Court. 3–12. No. 23, S. T., 1876. The Knickerbocker Life Insurance Company of New York, plaintiff in error, vs. Christina Trefz, def't in error. Citation. A. Q. Keasbey & Sons, att'ys of pl't'ff in error, Newark, N. J. Filed Nov. 20, 1877. S. D. Oliphant, clerk, &c.

4 *Stipulation.*

U. S. circuit court, third circuit, district of New Jersey.

CHRISTINA TREFZ
vs.
THE KNICKERBOCKER LIFE INSURANCE COMP'Y. } In case.

This suit having originally been commenced by attachment in the supreme court of the State of New Jersey, and the defendant corporation being a non-resident, and the amount involved exceeding five hundred dollars, and the defendant corporation being desirous of removing the same from the said State court to this court, it is stipulated and agreed as follows:

That the said cause be so removed.

That the declaration be filed at once in this court, and that the defendant plead thereto herein within thirty days from this date.

That the said cause shall be set down for trial without further
5 notice at the next term of this court, and be disposed of as soon as the court can hear the same.

And that the lien of the attachment shall be preserved and enforced, and the property and estate of the defendants, and all the rights, credits, and effects attached shall be held to answer final judgment herein.

And that certified copies of the proceedings in the said attachment suit may be filed as required nunc pro tunc if necessary to complete the record.

Signed on behalf of plaintiff by her attorneys,

COULT & HOWELL.

On behalf of the defendants by its attorneys,

A. Q. KEASBEY & SONS.

Dated December 15, 1876.

Stipulation. Filed Dec. 19, 1876.

6 United States circuit court for the third circuit, of the twenty-fifth day of November, eighteen hundred and seventy-six.

DISTRICT OF NEW JERSEY, *ss:*

The Knickerbocker Life Insurance Company, the defendants in this suit, were attached in the supreme court of judicature, of the State of New Jersey (whence the said cause was removed to this court), to answer Christina Trefz, the plaintiff therein, of a plea of trespass on the case upon promises; and thereupon the said plaintiff, by Joseph Coult, her attorney, complains: For that whereas heretofore, to wit, on the sixth day of September, eighteen hundred and seventy-three, at the city of New York, in the State of New York, to wit, at Newark, in the State and district of New Jersey, by a certain instrument or policy of assurance then and there made, the said defendants agreed that in consideration of the representations made to them in the application
7 for the said policy, and of the premium of one hundred and thirty-five dollars and seventy-eight cents to them in hand paid by the said plaintiff, who was then the wife of Thristoph Trefz, and of a premium of a like sum to be paid on or before the sixth day of September, in every year during the continuance of the *the* said policy, did assure the life of the said Christoph Trefz, in the amount of twenty-five hundred dollars, for the term of his natural life, for the sole use of the said plaintiff, or in the event of her death before the death of her said husband then for the sole use of her children, as thereinafter stated.

And the said defendants did therein and thereby agree to pay the amount of the said insurance at their office in the city of New York to the said plaintiff for her sole use, if living, in three months after
8 due notice and satisfactory proof of the death of the said Christoph Trefz, after deducting the balance of the year's premium, and any other counter claim or indebtedness, as therein mentioned.

And it was further therein agreed that if the said Christoph Trefz should travel upon the seas (except in voyages between coastwise ports of the United States), or should pass or remain beyond the settled portions of the United States, or beyond their protection (except into the settled portions of the dominion of Canada and the British provinces), or should enter into any military or naval service whatever (the militia not in actual service excepted), or should personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or should be employed as a mariner, engineer, fireman, contractor, or laborer in any capacity whatever, on any
9 sea, sound, inlet, river, lake, or railroad, without the consent of the defendants in each case previously given in writing, or if the said Christoph Trefz should die by his own hand or act, whether sane or insane, or in consequence of a duel, or of the violation of any law of any nation, State or provincial, or by the hand of justice; or if his death should be caused by the habitual use of intoxicating drinks, or opium; or if any of the statements made in the application for the said policy should be found in any respect untrue, then, and in every such case, the said policy should be void.

And it was thereon and thereby further agreed that if the said premium should not be paid on or before twelve o'clock noon, on the day or days therein above mentioned for the payment thereof, at the office of the said defendants, in the city of New York (unless otherwise expressly agreed in writing), or to agents, when they produce receipts
10 signed by the president or secretary, or if the principal of or in-

terest upon any note or other obligation given for payment of premium upon said policy should not be paid at the time the same becomes due and payable, then, and in every such case, the said defendants should not be liable to pay the sum assured, or any part thereof; and said policy should cease and be null and void without notice to any party or parties interested therein.

And it was also therein agreed that in every case when the said policy should cease and determine because null and void all payments made thereon should belong to the said defendants, except that in case of the death of the assured by his own hand or act, the said defendants would, upon a surrender of the said policy within three months after such death, return the net reserve on such policy as by the said policy of insurance, reference being thereto had, will, amoungst other things,

will more fully and at large appear; and the said plaintiff for
11 greater certainty begs leave to refer to a true copy of the said
policy hereto annexed and marked Exhibit number one, and asks that the same may be taken as part of this declaration.

And the said plaintiff further in fact says that she has paid all the said premiums due and to grow due upon the said policy at the times and in the manner in the said policy specified and agreed, from the date of the making of the said policy up to the time of the death of the said Christoph Trefz, as hereinafter stated; that is to say that she paid to the said defendants the sum of one hundred and thirty-five dollars and seventy-eight cents on the sixth day of September, eighteen hundred and seventy-four, and a like sum, one hundred

and thirty-five dollars and seventy-eight cents, on the sixth day of
12 September, eighteen hundred and seventy-five, to wit, at Newark
aforesaid, which payments of premiums were accepted by the said defendants.

And the said plaintiff in fact says that all the statements and representations made to the said defendants upon the issuing of the said policy were and are true, to wit, at Newark aforesaid.

And the said plaintiff further in fact says that at the time of the making of the said statements and representations, upon the faith of which the said policy was issued, and at the time of the making of the said policy of insurance, and of the said promise and undertaking of the said defendants, as last aforesaid, and also at the time of the death

of the said Christoph Trefz, she, the said plaintiff, was interested
13 in the life of the said Christoph Trefz to a large amount, to wit, to
the amount of all the monies by her issued thereon, to wit, at Newark aforesaid, and that she, the said plaintiff, before the making of the said policy of insurance, to wit, on the day and year last aforesaid, at Newark aforesaid, did state to the defendants the nature of her said interest.

And the said plaintiff further saith that afterwards, to wit, on the twenty-fourth day of February, eighteen hundred and seventy-six, at Newark aforesaid, the said Christoph Trefz died; and the said plaintiff further saith that the decease of the said Christoph Trefz, as aforesaid, was afterwards, to wit, on the eleventh day of March, eighteen hundred and seventy-six, duly certified to the said defendants at their office in

the city of New York: and that afterwards, and on the day and
14 year last aforesaid, satisfactory proof was furnished to the said
defendants by the said plaintiff of the death of the said Christoph Trefz, as aforesaid, and that the said plaintiff hath in all things performed, fulfilled, and kept all things in the said policy of insurance and the said conditions and the said stipulations therein contained on her

part to be performed, fulfilled, and kept according to the form and effect of the said policy of assurance and of the said representations and statements and conditions; and although the funds of the said company defendants always, from the time of the making of the said policy of assurance, have been and yet are sufficient to pay the said plaintiff the said sum of twenty-five hundred dollars, and although three months after the decease of the said Christoph Trefz was duly certified to the
15 said company defendants at their principal office as aforesaid, and after satisfactory proof was so produced of the death of the said Christoph Trefz, as aforesaid, have long since elapsed, of all which several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Newark aforesaid, had notice, and were then and there requested by the said plaintiff to pay to her the said sum of twenty-five hundred dollars by them so insured as aforesaid, yet the said defendants, not regarding their said promise and undertaking so by them made as aforesaid, did not nor would when they were so requested as aforesaid, or any time before or since, pay the said sum of twenty-five hundred dollars, or any part thereof, but have hitherto wholly neglected and refused, and still neglect and refuse so to do, to wit, at New-
16 ark aforesaid.

For that whereas also heretofore, to wit, on the sixth day of September, eighteen hundred and seventy-three, at the city of New York, in the State of New York, to wit, at Newark, in the State and district of New Jersey, by a certain other instrument or policy of assurance then and there made, the said defendants agreed that in consideration of the representations made to them in the application for the said policy and of the premium of four hundred and sixty-one dollars and sixty-four cents to them in hand paid by the said plaintiff, who was then the wife of Christoph Trefz, and of a premium of a like sum to be paid on or before the sixth day of September in every year during the continuance of the said policy, did assure the life of the said Christoph Trefz in the amount of
17 eight thousand five hundred dollars for the term of his natural life for the sole use of the said plaintiff, or in the event of her death before the death of her said husband, then for the sole use of her children as thereinafter stated.

And the said defendants did therein and thereby agree to pay the amount of the said insurance at their office in the city of New York to the said plaintiff for her sole use, if living, in three months after due notice and satisfactory proof of the death of the said Christoph Trefz, after deducting the balance of the year's premium and any other counter claim or indebtedness as therein mentioned.

And it was further therein agreed that if the Christoph Trefz should travel upon the seas (except in voyages between coastwise ports
18 of the United States) or should pass or remain beyond the settled portions of the United States or beyond their protection (except into the settled portions of the Dominion of Canada and the British Provinces), or should enter into any military or naval service whatever (the militia not in actual service excepted), or should personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances or in working or managing a steam-engine in any capacity, or should be employed as a mariner, engineer, fireman, conductor, or laborer in any capacity whatever, on any sea, sound, inlet, river, lake, or railroad, without the consent of the defendants in each case previously given in writing, or if the said Christoph Trefz should die by his own hand or act, whether sane or insane,
19 or in *or in* consequence of a duel or of the violation of any law of

any nation, State, or province, or by the hand of justice, or if his death should be caused by the habitual use of intoxicating drinks or opium, or if any of the statements made in the application for the said policy should be found in any respects untrue, then and in every such case the said policy should be void.

And it was therein and thereby further agreed that if the said premium should not be paid on or before twelve o'clock, noon, on the day or days therein above mentioned for the payment thereof, at the office of the said defendants in the city of New York (unless otherwise expressly agreed in writing), or to agents, when they produced receipts signed by the president or secretary; or if the principal or interest upon
20 any note or other obligation given for payment of premium upon said policy should not be paid at the time the same became due and payable, then, and in every such case, the said defendant should not be liable to pay the sum assured, or any part thereof, and said policy should cease and be null and void without notice to any party or parties interested therein.

And it was also therein agreed that in every case where the said policy should cease and determine, or become null and void, all payments made thereon should belong to the said defendants, except that in case of the death of the assured by his own hand or act, the said defendants would, upon a surrender of the said policy, within three months after such death, return the net reserve on such policy as by the said
21 policy of insurance, reference being thereunto had, will, amongst other things, more fully and at large appear; and the said plaintiff, for greater certainty, begs leave to refer to a true copy of the said policy hereto annexed, and marked Exhibit number two, and asks that the same may be taken as part of this declaration.

And the said plaintiff further, in fact, says that she has paid all the said premiums due and to grow due upon the said policy at the times and in the manner in the said policy specified and agreed from the date of the making of the said policy up to the time of the death of the said Christoph Trefz, as hereinafter stated, that is to say, that she paid to the said defendants the sum of four hundred and sixty-one dollars and sixty-four cents, on the sixth day of September, eighteen hundred
22 and seventy-four, and a like sum of four hundred and sixty-one dollars and sixty-four cents on the sixth day of September, eighteen hundred and seventy five, to wit, at Newark aforesaid; which payment of premiums were accepted by the said defendants.

And the said plaintiff, in fact, says that all the statements and representations made to the said defendants, upon the issuing of the said policy, were and are true, to wit, at Newark aforesaid.

And the said plaintiff further, in fact, says that at the time of the making of the said statements and representations upon the faith of which the said policy was issued, and at the time of the making of the said policy of insurance and of the said promise and undertaking of the said defendants as last aforesaid, and also at the time of the
23 death of the said Christoph Trefz, she, the said plaintiff, was interested in the life of the said Christoph Trefz to a large amount, to wit, to the amount of all the moneys by her insured thereon, to wit, at Newark aforesaid; and that she, the said plaintiff, before the making of the said policy of insurance, to wit, on the day and year last aforesaid, at Newark aforesaid, did state to the said defendants the nature of her said interest.

And the said plaintiff further saith that afterwards, to wit, on the twenty-fourth day of February, eighteen hundred and seventy-six, the

said Christoph Trefz died, and the said plaintiff further saith that the decease of the said Christoph Trefz, as aforesaid, was afterwards, to wit, on the eleventh day of March, eighteen hundred and seventy-six, duly certified to the said defendants at their office in the city of
24 New York; and that afterwards and on the day and year last aforesaid, satisfactory proof was furnished to the said defendants by the said plaintiff of the death of the said Christoph Trefz, as aforesaid, and that the said plaintiff hath in all things performed, fulfilled, and kept all things in the said policy of insurance, and the said conditions and the said stipulations therein contained on her part to be performed, fulfilled, and kept, according to the form and effect of the said policy of insurance, and of the said representations and statements and conditions; and although the funds of the said company defendant always, from the time of the making of the said policy of assurance, have been and yet are sufficient to pay the said plaintiff the said sum of eight thousand five hundred dollars, and although three months
25 after the decease of the said Christoph Trefz was duly certified to the said company defendant, at their principal office, as aforesaid, and after satisfactory proof was so produced of the death of the said Christoph Trefz, as aforesaid, have long since elapsed, of all which premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Newark aforesaid, had notice, and were then and there requested by the said plaintiff to pay to her the said sum of eight thousand five hundred dollars by them so insured as aforesaid, yet the said defendants, not regarding their said promise and undertaking so by them made as aforesaid, did not nor would when they were so requested as aforesaid, or at any time before or since, pay the said sum of eight thousand five hundred dollars, or any part thereof, but have hitherto wholly neg-
26 lected and *and* refused, and still neglect and refuse so to do, to wit, at Newark aforesaid.

For that whereas also the said defendants, on the day , eighteen hundred and seventy , at Newark aforesaid, were indebted to the plaintiff in the sum of twenty-five thousand dollars for the price and value of goods sold and delivered by the plaintiff to the defendants, at their request, and in twenty-five thousand dollars for the price and value of goods bargained and sold by the plaintiff to the defendants, at their request, and in twenty-five thousand dollars for the price and value of work done, and material for the same provided by the plaintiff for the defendants at their request, and in twenty-five thousand
27 dollars for money lent by the plaintiff to the defendants, at their request, and in twenty five thousand dollars for money lent by the plaintiff to the defendants, at their request, and in twenty-five thousand dollars for money received by the defendants for the use of the plaintiff, and in twenty five thousand dollars for money paid by the plaintiff for the use of the defendants, at their request, and in twenty-five thousand dollars, for interest due from the defendants to the plaintiff for the plaintiff's having forborne moneys due from the defendants to the plaintiff, at the defendant's request, for a long time then elapsed, and in twenty-five thousand dollars for money found to be due from the defendants to the plaintiff on an account then and there stated between them; and the defendants afterwards, to wit, on the day
28 and year last aforesaid, in the county aforesaid, in consideration of the premises, promised to pay *to* the said several last mentioned moneys respectively to the plaintiff, on request; yet the defendants disregarded their promises, and have not paid any of the said

moneys, or any part thereof, to the plaintiff's damage twenty-five thousand dollars; and thereupon she brings her suit. &c.

JOSEPH COULT,
Attorney for Plaintiff.

Exhibit Number One.

No. 54816. Age, 53 years; premium, $135.18; insurance, $2,500.

This policy of insurance witnesseth: That the Knickerbocker Life Insurance Company, of the city of New York, in consideration of the representations made to them in the application for this policy,
29 and upon the faith of which the same is issued, and of the premium of one hundred and thirty dollars and seventy-eight cents to them in hand paid by Christina Trefz, wife of Christoph Trefz, of Newark, in the State of New Jersey, and of the premium of a like sum to be paid on or before the sixth day of September in every year during the continuance of this policy, do assure the life of the said Christoph Trefz in the amount of twenty-five hundred dollars, for the term of his natural life, for the sole use of his wife, or in the event of her death before the death of her said husband, then for the sole use of her children, as hereinafter stated.

And the said company do hereby promise and agree to pay the
30 amount of the said insurance at their office, in the city of New York, to the said Christina Trefz, for her sole use of living, in conformity with the statute, and if not living, to her children, or to their guardian, for their use, in three months after due notice and satisfaction proof of the death of the said person whose life is hereby assured, the balance of the year's premium, if any, and *and* counter-claim or indebtedness here'nafter mentioned, being first deducted therefrom.

And the said company further agree that if after premiums on this policy for not less than three complete years shall have been duly received by them said policy shall cease in consequence of the non-payment of premium thereon, the company will, on due surrender of this
31 policy, and the dividends thereon, within three months after the said policy shall so cease and determine, issue in lieu thereof another policy payable as above, for an equitable amount to be determined by the company, but which, in case the age of the person whose life is hereby insured is now under forty years, and shall be at the date of such surrender under sixty years, shall not be less than the sum of the ordinary premiums actually received upon this policy: Provided, however, that in case the said premiums so actually received shall not amount to one hundred dollars, the company reserves the right to pay the surrender value in lieu of issuing such new policy.

This policy is issued and is accepted by the assured upon the following express conditions and agreements, to wit:

32 First. If the said person whose life is hereby insured shall travel upon the seas (except in voyages between coastwise ports of the United States,) or shall pass or remain beyond the settled portions of the United States or beyond their protection (except into the settled portions of the Dominion of Canada and the British Provinces,) or shall enter into any military or naval service whatever, (the militia not in actual service excepted,) or shall personal' engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in working or managing a steam engine in any capacity, or shall be employed as a marine en-

gineer, fireman, conductor, or laborer, in any capacity whatever, on any
see, sound, inlet, river, lake, or railroad, without the consent of
33 this company, in each or *or* either of the foregoing cases previously
given in writing, or if said person shall die by his own hand or act, whether sane or insane, or in *or in* consequence of duel, or of the violation of any law of any nation, State, or province, or by the hand of justice, or if his death shall be caused by the habitual use of intoxicating drinks or opium, or if any of the statements or declarations made in or accompanying the application for this policy, and upon the faith of which the same is issued, shall be found in any respects untrue, then, and in every such case, this policy shall be null and void.

Second. If the said premium shall not be paid on or before twelve
o'clock noon on the day or days above mentioned for the
34 payment thereof, at the office of the company in the city of New
York (unless otherwise expressly agreed in writing) or to agents when they produce receipts signed by the president or secretary, or if the principal of or interest upon any note or other obligation given for premium upon said policy shall not be paid at the time the same shall become due and payable, then and in every such case the company shall not be liable to pay the sum assured, or any part thereof, and said policy shall cease and be null and void, without notice to any party or parties interested herein, except that the stipulation for a new policy as hereinbefore provided shall remain in force.

Third. In case a loan of or credit for a portion of said premium shall
be made on this policy, said policy shall be subject to all of the
35 terms and conditions expressed in the acknowledgement or obligation given for such loan or credit, and to the payment of interest thereon in advance, and said loan or credit shall be a just counterclaim against any amount which shall become due and payable on this policy, and shall be deducted therefrom.

Fourth. In every case when this policy shall cease and determine or become or be null and void, all payments made thereon shall belong to the company, except that in case of the death of the insured by his own hand or act, the company will, upon a surrender of the policy within three months after such death, return the net reserve on said policy.

Fifth. I*n* the said company shall at any time accept a payment
36 of the premium on this policy after the time the same shall, by
the terms hereof, become due and payable, such acceptance shall not in any respect be deemed to enlarge the time for the payment of premium thereafter to become due on this policy, or be deemed any evidence of a usage of said company to accept payment of a premium after the same becomes due and payable.

Sixth. This policy is not assignable.

In witness whereof the Knickerbocker Life Insurance Company have caused this c ntract to be signed by their president and secretary, at the city of New York, this sixth day of September, one thousand eight hundred and seventy-three.

C. STANTON,
President.

Secretary.

[K. L. I. CO. COUNTERSIGNED, J. L. SEP. 6, 1872.]

(Endorsed :)

37 No. 54816. Knickerbocker Life Insurance Company of the city

of New York, office 239 Broadway. Insurance on the life of Christoph Trefz.

Registered 37, folio 178.

Amount insured, $2,500.

Amount of premium	$135 78
Policy fee	1
	$136 78

$135.78 becomes due annually the 6th day of September.

J. F. EMERY.

Exhibit Number Two.

No. 54818. Age 53 y'rs. Premium $461.64. Insurance $8,500.

This policy of insurance witnesseth: That the Knickerbocker Life Insurance Company of the city of New York, in consideration of the representations made to them in the application for this policy,
38 and upon the faith of which the same is issued, and of the premium of four hundred and sixty-one dollars and sixty-four cents to them in hand paid by Christina Trefz, wife of Christoph Trefz, of Newark, in the State of New Jersey, and of the premium of a like sum to be paid on or before the sixth day of September in every year during the continuance of this policy, do assure the life of the said Christoph Trefz in the amount of eighty five hundred dollars for the term of his natural life, for the sole use of his wife, or in the event of her death before the death of her said husband then for the sole use of her children, as hereinafter stated.

And the said company do hereby promise and agree to pay the amount of the said insurance at their office, in the city of New York, to
39 the said Christina Trefz, for her sole use of living, in conformity with the statute, and if not living to her children or to their guardian for their use, in three months after due notice and satisfactory proof of the death of the said person whose life is hereby assured, the balance of the year's premium, if any, and any counterclaim or indebtedness hereinafter mentioned being first deducted therefrom.

And the said company further agree that if, after premiums on this policy for not less than three complete years shall have been duly received by them, said policy shall cease in consequence of the non-payment of premium thereon, the company will, on due surrender of this policy and the dividends thereon, within three months after the
40 said *said* policy shall so cease and determine, issue in lieu thereof another policy, payable as above, for an equitable amount to be determined by the company, but which, in case the age of the person whose life is hereby insured is now under forty years, and shall be at the date of such surrender under sixty years, shall not be less than the sum of the ordinary premiums actually received by the company upon this policy; provided, however, that in case the said premiums so actual y received shall not amount to one hundred dollars, the company reserves the right to pay the surrender value in lieu of issuing such new policy.

This policy is issued and is accepted by the assured upon the following express conditions and agreements, to wit:

41 First. If the said person whose life is hereby insured shall travel upon the seas (except in voyages between coastwise ports of the United States) or shall pass or remain beyond the settled portions of the United States or beyond their protection (except into the settled

portions of the Dominion of Canada and the British provinces), or shall enter into any military or naval service whatever, the militia not in actual service excepted, or shall personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in working or managing a steam engine in any capacity, or shall be employed as a marine engineer, fireman, conductor, or laborer, in any capacity whatever, on any sea, sound, inlet, river, lake, or railroad, without the consent of this company, in
42 each or either of the foregoing cases previously given in writing, or if the said person shall die by his own hand or act, whether sane or insane, or in *or in* consequence of a duel or the violation of any law of any nation, State, or province, or by the hand of justice, or if his death shall be caused by the habitual use of intoxicating drinks or opium, or if any of the statements or declarations made in or accompanying the application for this policy and upon the faith of which the same is issued shall be found in any respect untrue, then, and in every such case, this policy shall be null and void.

Second. If the said premium shall not be paid on or before twelve o'clock noon on the day or days above mentioned for the payment thereof at the office of the company in the city of New York (unless
43 otherwise expressly agreed in writing), or to agents when they produce receipts signed by the president or secretary, or if the principal of or interest upon any note or other obligation given for premium upon said policy shall not paid at the time the same shall become due and payable, then, and in every such case, the company shall not be liable to pay the sum assured on any part thereof, and said policy shall cease and be null and void, without notice to any party or parties interested herein, except that the stipulation for a new policy, as hereinbefore provided, shall remain in force.

Third. In case a loan of, or credit for, a portion of said premium shall be made on this policy, said policy shall be subject to all the terms and conditions expressed in the acknowledgement or obligation given
44 for such loan or credit and to the payment of interest thereon in advance; and said loan or credit shall be a just counter claim against any amount which shall become due and payable on this policy, and shall be deducted therefrom.

Fourth. In every case when this policy shall cease and determine, or become or be null and void, all payments made thereon shall belong to the company, except that in case of the death of the insured by his own hand or act the company will, upon a surrender of the policy within three months after such death, return the net reserve on said policy.

Fifth. In case the said company shall at any time accept a payment of a premium on this policy after the time the same shall, by the terms hereof, become due and payable, such acceptance shall not in
45 any respect be deemed to enlarge the time for the payment of premium thereafter to become due on this policy, or be deemed any evidence of a usage of said company to accept payment of premium after the same becomes due and payable.

Sixth. This policy is not assignable.

In witness whereof the Knickerbocker Life Insurance Company have caused this contract to be signed by their president and secretary, at the city of New York, this sixth day of September, one thousand eight hundred and seventy-three.

C. STANTON,
President.

, *Secretary.*

(Stamp.)—K. L. I. Co.; countersigned J. L., Sep. 6, 1873.)

(Endorsed :)
No. 54818. Knickerbocker Life Insurance Company, of the city of New York. Office 239 Bro dway. Insurance on the life of Christoph Trefz. Registered. 37 folio, 178.

46 Amount insured ..... $ 8,500

Amount of premium. $461 64
Policy fee ..... $ 1

$462 64

$461.64 becomes due annually, the 6th day of September.

J. F. EMERY.

Declaration.—Filed January 6, 1877.

U. S. circuit court, district of New Jersey.

THE KNICKERBOCKER LIFE INSURANCE COMpany *ads.* CHRISTINA TREFZ. } In ass'p't.

NEW JERSEY, *to wit;*

And the said defendant, by A. Q. Keasbey & Sons, its attorney, comes and defends the wrong and injury, when, &c., and says, as to the first and secound counts of the plaintiff's declaration, that it did not undertake and promise in manner and form as the said plaintiff hath
47 above thereof complained against it, and of this it puts itself upon the country, &c.

And for a further plea in this behalf to the first count of the plaintiff's declaration, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendant saith that said policy of insurance contained a condition therein written that said policy should be null and void if the death of the said Christoph Trefz should be caused by the habitual use of intoxicating drinks. And the said defendant avers that his death was caused by the habitual use of intoxicating drinks, and this it is ready to verify.

And for a further plea in this behalf, as to the second count in
48 said declaration contained, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendant says that said policy of insurance contained a condition therein written that if the death of said Christoph Trefz should be caused by the habitual use of intoxicating drinks, the said policy should be null and void, and the said defendant avers that the death of said Christoph Trefz was caused by the habitual use of intoxicating drinks, and that it is ready to verify.

A. Q. KEASBEY & SONS,
Def't's Att'y.

STATE OF NEW YORK,
Southern District of New York, ss:

John A. Nichols, of full age, being duly sworn according to law,
49 on his oath saith that he is the president of the Knickerbocker Life Insurance Company, a corporation, the defendant, and that the above plea is not intended for the purpose of delay, and that this

deponent verily believes that the defendant hath a just and legal defence to this action on the merits of the case.

J. A. NICHOLS.

Sworn and subscribed this 27th day of February, A. D. 1877, before me.

[L. S.] JOHN C. FOSTER,
Notary Public.

Pleas. March 1, 1877.

Replication.

U. S. circuit court, district of New Jersey.

CHRISTINA TREFZ
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } In case.

50 And the said plaintiff, as to the plea of the said defendant, whereof it hath put itself upon the country, doth the like, &c.

And the said plaintiff, as to the said plea of the said defendant, by it secondly and thirdly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant corporation, because she says that the death of the said Christoph Trefz was not caused by the habitual use of intoxicating drinks, and this the said plaintiff prays may be inquired of by the country, &c.

JOSEPH COULT,
At'y of Pl'ff.

Replication. Filed March 21, 1877.

51 Therefore, let a jury thereupon come before the judges of the United States circuit court for the district of New Jersey, at a circuit court to be held at Trenton, in said district, on the twenty-fifth day of September, in the year of our Lord eighteen hundred and seventy-seven, by whom, &c.; who neither, &c.; because as well, &c.; and the same day is given to the parties aforesaid. Afterwards, that is to say, on the day and year within contained, come as well the within named plaintiff, as the within named defendants, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made being summoned also come, who, to speak the truth of the matter within contained, being chosen, tried, and sworn, say upon their oath that the said defendants did undertake and promise, in manner and form as the said plaintiff as aforesaid has within complained
52 against them, and they assess the damages of the said plaintiff by reason thereof to eleven thousand nine hundred and ninety-eight dollars and eighty-two cents, besides her costs and charges by her about her suit in this behalf expended.

Therefore, it is considered that the said Christina Trefz do recover against the said The Knickerbocker Life Insurance Company her damages by the jurors aforesaid, in form aforesaid, assessed to eleven thousand nine hundred and ninety-eight dollars and eighty-two cents, and also two hundred and two dollars and nineteen cents for her costs and charges by the court now here adjudged to the said plaintiff, and with

her assent, which said damages, costs, and charges, in the whole, amount to twelve thousand two hundred and one dollars and one cent.

And the said defendants, in mercy, &c.

Judgment signed the twenty-seventh day of September, A. D. eighteen hundred and seventy-seven.

JNO. T. NIXON, *J.*

53 (Indorsed:) U. S. circuit court, district of New Jersey, third circuit. Christina Trefz vs. The Knickerbocker Life Insurance Co. In case. Transcript & exemplification of judgment. Copy, $16.50

54 *Bill of exceptions.*

United States circuit court for the district of New Jersey.

CHRISTINA TREFZ
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY of New York.

Afterwards, to wit, on the twenty-fifth of September, eighteen hundred and seventy-seven, at a stated term of the said court begun and holden at the city of Trenton, befor' the honorable John T. Nixon, district judge, the issue joined between the parties aforesaid, as by the record more fully appears, came on to be tried before a jury duly empanelled, the plaintiff being represented by Joseph Coult, esquire, and the defendant by Henry W. Johnson and A. Q. Keasbey, and the trial was continued until the twenty-seventh day of September, eighteen hundred and seventy-seven.

And in the course of the trial the said counsel for the defendant did take sundry exceptions to the rulings and charges of the court, and to the refusal of the court to give certain instructions to the jury, as
55 then and there prayed for by them, which said exceptions are hereinafter severally set forth.

The plaintiff offered in evidence two policies of insurance issued by the defendant in her favor on the life of her husband, Christopher Trefz, both dated September sixth, eighteen hundred and seventy-three, one for eight thousand five hundred dollars, and the other for two thousand five hundred dollars (prout the same), and also proofs duly presented of the death of Christopher Trefz on the twenty-fifth of February, eighteen hundred and seventy-six.

And the plaintiff also offered in evidence renewal receipts for the premiums due on said policies from September sixth, eighteen hundred and seventy-three, to September sixth, eighteen hundred and seventy-six, signed by the president and secretary of said company (prout the same), without making further proof of the payment of such premiums; and thereupon the defendant excepted to the sufficiency of such proof of payment, and moved the court to nonsuit the plaintiff on that ground, which the court refused, and admitted the evidence as sufficient proof of the payment of the premiums; to which the defendant prayed an exception, and the same was sealed accordingly.

56 And it was further proved in said cause, that on the twenty-fifth day of May, eighteen hundred and sixty-seven, a policy was issued by the company in favor of the plaintiff on the life of her husband for three thousand dollars, and one on the eighteenth of March, eighteen hundred and sixty-eight, for ten thousand dollars, which two

policies were surrendered on the thirtieth of August, eighteen hundred and seventy-three; and on that day a written agreement was entered into between the parties, both being in the following terms, each referring to the number and amount of the corresponding old policy:

"The undersigned, owner of policy No. 16772, on the life of Christopher Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for two thousand five hundred dollars, with insurance payable annually, and in consideration thereof, I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made, and are hereby made the basis of the contract between myself and the said company for the new policy hereby solicited."

The other agreement was in the same form, and asks for a pol-
57 icy of eight thousand five hundred dollars, and both are signed by Christina and Christopher Trefz.

The applications and declarations upon which the original policies were issued were also offered in evidence by the defendant on cross-examination (prout the same); and thereupon the counsel for the defendant asked the court to rule that the contracts now sued upon include the statements made in advance of the issuing of the first policies, and that those statements form a part of the contract to such an extent that they become express warranties, and that the plaintiff was bound to prove the truth of those statements as conditions presedent.

Whereupon the court refused to make such ruling, and the counsel for the defendant prayed an exception, and the same is sealed accordingly.

JNO. T. NIXON. [SEAL.]

And after the evidence on the part of the plaintiff was closed, the defendant offered evidence tending to prove that the answers of the plaintiff to the interrogatories contained in the said original applications as to whether the said insured then or formerly, when, or how long, and in what degree had been subject to or at all affected by any of
58 the diseases specified in said interrogatories, including among such diseases, disease of the brain, which answers were in one case, "No," and in the other, "Never sick," were, at the time of such applications, untrue. Which evidence was as follows:

HENRY F. SCHIMPER, being sworn on the part of the defendant:

Q. Where do you live?
A. Newark.
Q. What is your business?
A. I am out of employ now.
Q. Were you ever employed as bookkeeper by Christian Treffz?
A. Yes, sir.
Q. Where was he carrying on business at that time?
A. New York.
Q. And when did you enter upon his employment?
A. Upon it in 1866.
Q. At what season of the year?
A. I think it was in August.
Q. Was he carrying on a large business?
A. Yes, sir; he was doing a large business.
59 Q. What was his business?

A. Malt and hops.
Q. Was he personally actively engaged in the business?
A. Yes, sir.
Q. Where was his wharf?
A. In Elizabeth.
Q. Did he attend to the business of shipping and managing?
Q. Did he attend to the active management of the business personally?
A. Yes, sir.
Q. Do you know of his having an attack of sickness during the summer you came there?
A. Not to my knowledge.
Q. Do you know from statements by himself?
A. He stated so once himself.
Q. What did he state?
A. He said he was overcome by heat that same summer.
Q. What did he call it?
A. Sun stroke, he called it.
Q. Did he tell you how long he had been so overcome?
A. A couple of days.
60 Q. Did he tell you what he was doing when the sunstroke came on?
A. Yes; but I forget; he told me that once in the insurance office when he was examined by the doctor.
Q. Do you know whether he went to Sharon Spring that summer?
A. Yes, sir; he went shortly after I was there; it was a couple of weeks after I came there to the business he went to Sharon Springs; he went to Albany, and from there went to Sharon Springs.
Q. How long was he at Sharon Springs?
A. May be a week; he came back and went up again afterwards; he was there a couple of times during the time.
Q. How long in all was he there?
A. I cannot state; it must have been there three or four weeks afterwards.
Q. How long was it before he went that he had the sunstroke?
A. That I cannot tell exactly; I think two or three weeks after I I came there he went; I don't know how long before it was he
61 had the sunstroke; it may have been a month before, or something like it; he was not sick at the time I came there.
Q. It was not while you were there he had the sunstroke?
A. No, sir; I was not engaged in the business by Mrs. Treffs; I think it was Monday I went there, and could not see her that day, and they said I should call again on Thursday; I came there on Thursday and saw Mr. Treffs; he was all satisfied, and from that time I had my position; a couple of weeks afterwards—think it was a fortnight, it may have been longer, I don't recollect very much—he went to Sharon Spring; he complained about the malt, he had not malt enough, and he went up to Albany; from Albany I think he went to Clyde, and then went to Sharon Springs; he then wrote back to Mrs. Treffs to come up; she was unwell at that time, and he thought it would do her good;
62 she went up, and shortly after she went up he came down.
Q. He did not take her the first time he went up?
A. No, sir.
Q. Did he say what he was going for?
A. Going for malt to Albany.
Q. To Sharon Springs?
A. To recruit himself, very likely.

Q. Did not he say he was going to recruit?

A. He did not say much to me about it; he did not feel sick at the time when he went away; I suppose he was often there; he talked about Sharon Springs as being very much acquainted up there; most of his customers were up to Sharon Springs every summer.

Q. Who was bookkeeper for him before you came, when he had s unstroke?

A. Mr. Jeller.

Q. Is he dead?

A. He died before I came there.

Q. Do you know what has become of the other people employed there during that time?

A. No; there was Mrs. Treffs' brother was there and a man of
63 the name of Kayler.

Q. Do you know where Mr. Kayler is?

A. No, sir; I don't know; I have not see' Mr. Kayler, I think, since I left New York.

Q. Don't you know that Mr. Kayler did live in Newark?

A. He lived in New York; I don't think I have seen Kayler since I left New York.

Q. You have not heard of his death lately?

A. No, sir; I have not.

Q. Had you not often heard Mr. Treffs talk about this sunstroke that he had?

A. He would say sometimes that he had sunstroke, but I never heard him talk much about it, except when he was examined by the doctor that time; then the doctor asked him.

Q. Well, my question is, have you not often heard him talk about the sunstroke?

A. Yes; once in a while he would say so.

Q. What did he speak of it for?

A. Well, people would talk about sunstroke; he always car-
64 ried in summer a cabbage leaf in his hat or cap, and if people asked he would say, "I was once sunstruck; I don't want it again."

Q. Did he in fact carry a cabbage leaf in his hat?

A. I have seen it.

Q. What kind of a one, a large cabbage leaf?

A. A cabbage leaf.

Q. A whole cabbage leaf?

A. Covering the inside of his head.

Q. Did you carry one?

A. No, sir.

Q. Was it a green cabbage leaf?

A. Yes, sir.

Q. Did he change it often?

A. I don't know.

Q. Could you tell whether it was a green cabbage leaf when you saw it?

A. I' was a green cabbage leaf.

Q. Was it not necessary to have it changed often?

A. I don't know.

Q. Can a man carry a green cabbage leaf in his hat long?

A. I don't know; I don't carry it.

65 Q. You have seen Mr. Treffs with a leaf in his hat?

A. I have seen him and other people.

Q. I don't ask about other people; have you seen Christian Treffs, you must know all about it; people that you have seen carry cabbage leaves in their hats as a general thing, do you know how often they were renewed?

A. No, sir.

Q. Did you know whether they were kept there until they became dry and withered, or whether they take pains to keep them renewed?

A. I don't know.

Q. How was it with Mr. Treffs?

A. I saw him with a cabbage leaf; I may have seen it when he took off his hat in the office, but he was never in the office much; he could not renew it when he was in the office, because he could not get one there.

Q. Was it habitual with him through the hot weather to wear a cabbage leaf in his hat?

A. I have seen him several times.

Q. Was it his habit to speak to people about it?

66 A. I don't know unless people saw him and asked about it.

Q. Did not people often see it and ask about it?

A. Oh, yes, sir; other people would see it and talk about it.

Q. Will you be kind enough to say what was Mr. Treffs' ordinary reply to these observations?

A. I cannot tell that; I heard him say this was a good thing in getting a sunstroke to keep the head cool.

Q. You have already stated he said he had had one and did not want any more.

A. That was what he would say, he had had one and did not want it any more, and could not get it if he had a cabbage leaf in his hat.

Q. Did he tell you how long he was confined to the house when he had that sunstroke?

A. The first I heard of it was when he was examined there; I didn't know before.

Q. You say you used to see him and hear him talk about it?

67 A. Yes; he would say he had had sunstroke.

Q. Was not that before he was examined?

A. I think, myself, if I may give you my thought, I thought afterwards he makes more out of it than it was.

Q. He did make a great deal out of it, did he?

A. Well, he would say he had had a sunstroke.

Q. What do you mean by saying he made more out of it than he needed?

A. Well, I think he was fond of blowing, to tell people he had had a sunstroke. I think if a man has a sunstroke he is going to die. I often laughed at him, and said he never had a sunstroke.

Q. You told him he never had a sunstroke?

A. Yes, sir.

Q. Did you know anything about it?

A. No, sir.

Q. What did he say when you said he never had sunstroke?

68 By the COURT. The witness says that Treffs told him he never had sunstroke.

Q. How do I understand you?

A. I says to Treffs, I don't believe he ever had a sunstroke.

Q. What did he say to that?

A. He laughed, and very seldom gave an answer to me.

Q. Did he still continue to talk about having a sunstroke?

A. That may have happened once or twice a year.

Q. Did not you hear him talk about that before you went to the insurance company?

A. I never knew anything about it.

Q. When did he carry a cabbage leaf in his hat?

A. When he was in Newark; that was a couple of years after I went there; we left New York in 1869; Mr. Treffs bought a place in Newark, and came to live in Newark; while he was building it there, I often had to go to get the masons and carpenters to do the work.

Q. Did he carry the cabbage leaf to the doctor's office at the insurance companie's?

69 A. No, sir; not then.

Q. Have you stated the day that you went there?

A. I don't recollect.

Q. In August, you said?

A. I think it was in August; the begining or middle of August.

Q. It was in the hot weather of 1866, the sunstroke he spoke of occurred?

A. Very likely.

Q. When you went there first, did you talk to Mr. Treffs about what had happend that summer in the way of sunstroke; don't you remember hearing him speak of it then?

A. I had lots to do when I came into that business; the bookkeeper had not been there for some time; Mrs. Treffs kept the books, and she did not keep them the same way as I would have it, so I had a good deal of work to get the books in order; then they left for Sharon Springs, and after they came back, Mrs. Treffs did a good deal of the office business, and Mr. Treffs was over on the other side a good deal, and sometimes for days I would not see Mr. Treffs.

70 Q. Well, in talking about that, you say that Treffs was in the habit of "blowing" about sunstroke?

A. Yes, sir.

Q. Did not you hear him "blow" about sunstroke shortly after it happened?

A. No, sir; I think it was after we were in Newark.

Q. Did not you hear him talk about it the time he went to Sharon Springs?

A. Not to me.

Q. Are you sure of that?

A. Sure of that; I did not know anything about it.

Q. Did not you hear it talked about at the place as a common thing?

A. I don't believe that anybody in the neighborhood knew it; I never heard anything about it, and all the neighbors that was there up to 1869 were the old neighbors that were there before.

Q. How did you know it was in the summer of 1866 that he had the sunstroke?

A. Because he said so at the time he was in the office.

71 Cross-examined:

Q. You were the bookkeeper, as I understand, to Mr. Treffs, and you went there for that purpose?

A. Yes, sir.

Q. In 1866?

A. Yes, sir.

Q. In August?

A. Yes, sir.
Q. And you continued with him how long?
A. Up to the eighteenth or twentieth day of January, 1875.
Q. How long did he remain in the city of New York?
A. I think Mr. Treffs moved over to Newark in either the spring of 1869—I think it was in the spring of 1869.
Q. Spring of 1869?
A. '69, in '68 or '69; I cannot remember very well; I moved over to Newark in 1869, in the fall; that I know distinctly, and Mr. Treffs was in Newark already for some time.
Q. How long did you continue in his employ?
A. Up to 1875—January, 1875.
Q. And you left before his death?
72 A. I left before his death; about a year before he died.
Q. And you have not been in his employ since?
A. No.
Q. Mr. Treffs, you say, was a brewer?
A. No, sir; he was in the malt business.
Q. A maltster, is that it. What is it; furnishing supplies to brewers?
A. No, sir; malt.
Q. Your distinction is, a brewer, one who brews ale?
A. A brewer is the one who uses the malt, and the maltster is the man who makes the malt.
Q. And he was carrying on a large business, was he?
A. Yes, sir.
Q. You mean a man who deal with malt?
A. A man who deals or makes the malt; he was malting at that time, malting barley himself.
Q. He was carrying on, you say, a large business?
A. Yes, sir.
Q. And he continued to carry on a large business until his death?
73 A. No, sir; he gave up that business and went into the brewing business in 1869.
Q. Where?
A. In Newark.
Q. And continued in that up to the time of his death?
A. Up to the time of his death.
Q. Did he work in his own business?
A. In the brewing business he did.
Q. Did he while in the malt business?
A. He did.
Q. When he went into the brewing business, did he take charge of and oversee his business?
A. Yes, sir; oversee his business.
Q. Did he have a large number men under him?
A. Yes, sir.
Q. How many?
A. Always between thirty and forty men there.
Q. Was he an active man?
A. He was.
Q. You say that he went to Sharon Springs soon after you went into his employ; was he not in the habit of going to Sharon Springs every summer?
A. Most of the brewers do it.
74 Q. And did he?
A. I had not been there before; I don't know.

Q. After that, too?
A. I think he was there once more; that is all I know.

By Mr. KEASBEY:

Q. When; what season?
A. He spoke of it afterwards that season. I don't know whether he returned after that. I think he was there two or three years after.

Further cross:

Q. You say it is a place where the brewers went?
A. Yes, sir.
Q. Summer place?
A. Yes, sir; summer place.
Q. In the heat of the summer they go there and stay awhile?
A. Yes, sir.
Q. You say that you learned from Mr. Treffs that some time in 1866 he had a sunstroke?
A. So he said.
75 Q. How long was that before you went with him, or was it after you went with him?
A. It must have been before, because I never saw anything of it.
Q. When you went with him he was in good health, as far as you knew?
A. Yes, sir.
Q. Was he making any complaint?
A. No, sir.
Q. Attending to his business regularly?
A. Yes, sir; but I did not watch then. I did not see him for two or three days.
Q. He had some other department to attend to?
A. He was attending to the business.
Q. He was apparently in good health?
A. Yes, sir.
Q. Making no complaint?
A. Making no complaint.
Q. He went to Sharon Springs?
A. Yes, sir.
Q. He went some*times* else first?
A. Yes, sir; he went to Albany, and then, I think, by Clyde. I told him we were short of malt. I took stock and saw there was not malt enough to supply our customers in the fall. Well, he said he was
76 going up to the West. He meant, very likely, west of the State of New York. He went by the boat a couple of days after. When he went to Sharon Springs that time he went up by the boat to Albany, and then to Sharon Springs, and wrote a letter down saying it would be better for his wife to come to Sharon Springs; and Mrs. Treffs went up there.
Q. Was he not in the habit of going, for the very purpose of buying malt, to Sharon Springs?
A. Not Sharon Springs. It was hops.
Q. Well, did not he buy hops there?
A. Brewers and dealers in hops generally go there to see about hops.
Q. That was the place they went for the purpose of engaging their hops?
A. Yes, sir.
Q. He came back, you say, pretty soon after?

A. Well, I think about a week after Mrs. Treffs was up there Mr. Treffs came back.

Q. When he came down what did he do?

A. He went to his business then.

Q. Went around his business as usual?

A. Yes, sir.

77 Q. And then went back again and staid some little time?

A. Yes, sir.

Q. He was an active man all the time, nearly, up to the time of his death, was he not?

A. Well, as long as I knew him.

Q. You say you heard him say afterwards that he had sunstroke, and you stated the first that you ever heard that, as I understood you, was some time when you was with him at the life insurance company's office; what life insurance company's office?

A. The Knickerbocker Life Insurance Company's.

Q. Where was that?

A. Broadway.

Q. When was that, and how did you happen to be there?

A. I think it was in 1872; I forgot to pay the premium.

Q. You forgot to pay the premium; and what did you do?

A. I was going to give a check to one of our collectors to go to New York. We had a little conversation about something else, and I

78 forgot it, and went out of the office down town and forgot it.

Q. You say you were book-keeper?

A. Yes, sir.

Q. Did you attend to the payment of the life insurance?

A. I had the whole management under my fingers. I was general manager at that time.

Q. Of the book-keeping and financial part; and you kept the fire insurance and life insurance, and all that, and you drew checks for him to sign?

A. Yes, sir.

Q. And you say you forgot to pay the premium at one time?

A. Yes, sir.

Q. What kind of premium was he paying then; how was he paying the premium?

A. I don't know. I think there was two policies to be paid; two policies of Mr. Treffs, one quarterly and the other every six months, to be paid, and it was one of those—I don't recollect which—had to be paid. I came as soon as I found out everything. I thought of it the next morning, and told Mr. Treffs. He had to go along with me over

79 to New York, because I heard a great deal about the Knickerbocker Insurance Company making offsets against people who did not go the same day and same hour which it is due. I went over to the office and offered a check for payment, and the young man would not take it. The policy was not certified, I think.

Q. You went next day, was it?

A. Yes, sir; it was right after. I don't know but that it was Saturday, I forgot it, and went down Monday, or whether on a week day; I cannot recollect any more.

By Mr. KEASBEY:

Q. You cannot settle the time of this?

A. It was pretty near a year before this policy was changed.

Further cross:

Q. A year before it was changed?

A. A year before it was changed, or half a year before it was changed; it was shortly afterwards. They then told me at the office they can get Mr. Treffs re-examined. I had to go up stairs with
80 Mr. Treffs to the doctor. I went up and asked him his name, "Are you the doctor?" "Yes, sir." "Doctor of this company?" "Yes, sir." "There is Mr. Treffs," such and such a case. Then he examined him, and had a long talk.

Q. You say you went then, and one of the policies went over a day or so?

A. Yes, sir.

Q. You went with a check and they would not take it?

A. They would not take it.

Q. Said he had to be re-examined?

A. Yes, sir.

Q. And sent you up to the doctor?

A. Yes, sir.

Q. And you went up with Mr. Treffs?

A. Yes, sir.

Q. What took place?

A. They examined him, and the doctor asked me whether Mr. Treffs had sunstroke; I said, no; Mr. Treffs said yes, he was sunstruck on the farm once; he had a farm and was at the farm taking in hay *in hay* and was sunstruck.

81 By the COURT:

Q. Are you stating what Mr. Treffs said?

A. Yes, sir.

Q. Well, commence again.

A. He told the doctor he was on the farm——(interrupted.)

Q. Did not you just state the doctor asked you whether Mr. Treffs was sunstruck?

A. Yes, sir.

Q. What suggested to the doctor the fact of sunstroke?

A. I asked the same question of the doctor whether he could see it; he said, "I could see it by his queer action with his elbow;" and so "I could see that the man had something;" that was the doctor's answer since to me; and he asked me whether he had sunstroke, and Mr. Treffs told he was working on the farm once, and was ovecome by the heat; he said that did not matter; that did not make any difference; he said, "Have you felt anything since?" And he said, "No." "Was you sick any time, taken sick by the heat again afterwards"? "No,"
82 "That is all right." He gave him a certificate; down we went with the check; they took it then and gave me the receipt for the premium.

Further cross:

Q. Then that was some time before?

A. At that same time they asked me down there at the office *to the* whether we could not pay a hundred or more dollars, a couple of hundred dollars on account of those notes which were pending on the policies. I told them no; that we were not prepared now to do any such thing. I told them, "We will do something for you next year"—next payment.

Q. You had been paying half note and half cash, had not you?

A. I don't recollect; it was a great amount of notes; they say that we have to do something; well, I told them the next payment we would do something for them, and they came over meanwhile with the paper.

Q. Came over where?
A. To the office—to Mr. Treffs; Mr. Treffs was not in.
Q. "Meanwhile," how long?
83 A. About the next payment, when the next payment got due, around that time; it was a young man; he came over and say they had to change their policies; they could not make out that way.
Q. Could not make out that way; what do you mean?
A. By notes; could not get enough cash in them, they would have to change the thing; Mr. Treffs should pay those back premiums and they would allow something. I submitted that to Mr. Treffs, and told him about it, and he was satisfied to have the thing cash payments. I was short of cash in the business and told Mr. Treffs it would not do now to pay these things. I think it amounted to eight hundred dollars; somewhere along there.
Q. That was cash?
A. Yes, sir; that I could not do it just then; he said make it the other way; then I had to sign this application, whatever it was, to get the policy transferred to cash payments. The man asked me
84 then whether Mr. Treffs would like to have quarterly, half-yearly, or yearly payments; I said, "You had better make it yearly"; that I forgot once and had lots of trouble, and had to take Mr. Treffs over and have him re-examined, and I would not have it happen again.
Q. Well, then you have stated that Mr. Treff sometimes wore a cabbage leaf in his hat; subsequent to that time, did you see other people do the same thing.
A. Oh, yes; people working, being out in the sun; most of our drivers did it; he often fetched cabbage leaves in the morning and gave them to the drivers; the drivers went to New York, you know, and being in the sun the whole time he gave them cabbage leaves to put in their hats.
Q. Do people wear sponges in their hats?
A. Not that I know of.

Redirect:

Q. How many times did you miss payment?
A. Once.
Q. Was that the time along before these new policies were taken out?
85 A. It was before that time, before these new policies were taken out.
Q. Won't you try just and answer my questions, and not go off into so many other statements; I simply ask you if it was before?
A. Yes, sir; it was before?
Q. Was there any talk about new policies at the time you went over to get the insurance renewed?
A. No, sir.
Q. Was your only object to save the policy from forfeiture by inducing them to take the premium and go on?
A. I took Mr. Treffs along; it was not the object to offer them anything except the premium.
Q. Did you and Mr. Treffs go there in order to keep the policy alive by paying your premium?
A. By having Mr. Treffs examined again or re-examined; yes, and paying the premium.
Q. Was any change made in the policy at that time?
A. No, sir.
Q. Where did you go to have Mr. Treffs examined?

86 A. He was first in the office, that was on the first floor, and then we were told to go upstairs to the doctor; that was one flight of stairs, and up to the first floor.

Q. Do you know the name of the doctor?

A. I could not recollect scarcely.

Q. What did Mr. Treffs say to him when he went in to see him?

A. He did not say anything; I went in and asked the doctor whether this was the name; whether he was the doctor for the life insurance company; he said, yes; then I told him what happened.

Q. What did you tell him happened?

A. We forgot to pay the premium, and were sent upstairs to have Mr. Treffs re-examined again.

Q. What did he do then?

A. Told Mr. Treffs to take his coat off and his vest, and he re-examined him.

Q. What did Mr. Treffs say to him?

A. He asked Mr. Treffs several questions, and Treffs answered the questions.

Q. Did Mr. Treffs make any statement except in answer to questions?

87 A. Not that I know of.

Q. Had you or Mr. Treffs said anything about sunstroke when he asked that question, whether he had had sunstroke?

A. The doctor asked me whether Treffs had sunstroke.

Q. Had you or Treffs said anything about it before that time?

A. No, sir.

Q. Then the first suggestion as to sunstroke came from the doctor?

A. Yes, sir; from the doctor himself.

Q. Did he ask you that question before Mr. Treffs?

A. Yes, sir; Mr. Treffs was standing there; we were in conversation then; it was after the examation.

Q. When he asked you whether he had sunstroke, what did you say?

A. I said, "No;" I don't know.

Q. Did he ask Treffs?

A. Yes, sir.

Q. What did Treffs say then?

A. He told him he had sunstroke once when he was working on the farm.

88 Q. You said just now he said he was overcome by the heat?

A. That was it; he was then working, and he fell down and did not know anything about himself any more; that was his talk to the doctor.

Q. Just state what Mr. Treffs said.

A. That is as near as I can give it, Mr. Keasbey; Mr. Treffz spoke very bad English; that was the reason the doctor asked me first off whether Mr. Treffs had sunstroke because he did not understand him well, so Treffz told he was overcome by the heat; he said that half English and half German.

Q. Overcome by the heat?

A. Yes, sir.

Q. Then he did not use the word sunstroke?

A. Yes, sir; he used the word afterwards, sunstroke.

Q. When did he say this happened?

A. Well, as much as I could make out it was that same summer that I came there.

Q. 1866?

A. 1866.

89 Q. Did he tell the doctor he had been in the habit of wearing cabbage leaves in his hat?

A. Not that I know of.

Q. You said that he told the doctor he was overcome by heat, but had not had any effect from it since?

A. No; that he had not no effect from it since.

Q. He told the doctor that?

A. Yes, sir.

Q. He told the doctor he had been overcome by heat on his farm in 1866, but had never had any bad effect from it since?

A. That is what he say to the doctor.

Q. You spoke of the doctor mentioning that he acted queer with his e'bows?

A. Yes, sir.

Q. How did that come up?

A. Well, Mr. Treffs had something on him; when he spoke he always moved his arm (witness illustrated) so.

Q. Please make it plain so that it can be taken down?

A. I cannot make it plainer, what he called in German * * * * *.

90 Q. What does that mean, nervous?

A. No; it means stiff.

Q. Twitching?

A. Well, kind of stiff, sort of stiffness in your arm, not quite stiffness; could not give the word exactly in English what it means.

Q. I would like you to explain, if you can, what peculiar characteristics there were in the movements of Mr. Treffs?

A. He moved in a peculiar way; if he got excited in speaking, he raised his arms (witness illustrated) as some Frenchmen do.

Q. Was there a twitching, a nervous twitching?

A. No, sir; not at all.

Q. What was the matter with his speech?

A. He could speak very little in English, could not pronounce very well; speak half English and half German when he spoke English.

Q. Was there any hesitation in his speech?

By the WITNESS. What do you mean by hesitation?

COUNSEL. Slowness of speech.

A. No, sir.

91 By the COURT. I understand the witness says in regard to speech that he was not acquainted with our language.

By the WITNESS. Yes, not acquainted much with the English language; he could not speak much English.

Q. You say that Mr. Treffs made no complaint about his health; what time are you speaking of when you make that remark?

A. The time that I entered Treffs' business.

Q. Well, afterwards, when you heard him blowing about the sunstroke, when was that?

A. Oh; that was years afterwards; all the time I was there from time to time he mentioned it once and a while.

Q. Did he continue to talk about that from time to time?

A. Oh, yes; as far as I know.

Q. You say he was in the habit of bringing cabbage leaves and distributing them among the men?

A. Yes, sir; the drivers.

92 Q. Did he give them any reason for using cabbage leaves?

A. Yes, sir.
Q. What did he tell them?
A. Not to be overcome by the heat, as we often had drivers overcome by the heat.
Q. Did he say anything about himself, his own experience?
A. Well, I don't know; he might have done.
Q. What do you remember about it?
A. Well, I don't know.
Q. Was he very careful about the matter of heat in the head?
A. Not that I know; he often ran about bare-headed in the summer.
Q. You say he was active.
A. He was in business active.
Q. Was he a strong, active man?
A. He was a very strong man.
Q. What sized man was he?
A. He was a little shorter than I was, but broad shoulders, but very strong man, and a hard-working man; he could do more in one
93 hour than I could do if I had four.
Q. (Pointing to a gentleman in court.) Is this the gentleman you spoke to about the examination?
A. I cannot remember; I only saw the gentleman once at that time; I cannot remember.

Dr. WILLIAM O'GORMAN, being sworn on the part of the plaintiffs, (called at this time by consent).
Q. Dr. O'Gorman, what is your business?
A. Physician.
Q. At Newark?
A. In the city of Newark.
Q. How long have you been practicing, sir.
A. Thirty years.
Q. Did you know Christian Trefz in his life time?
A. Yes, sir.
Q. Did you attend him professionally?
A. I saw him in consultation on two occasions.
94 By the COURT:
Q. You are speaking now, doctor, in reference to his last sickness?
A. His last sickness.
Further direct examination:
Q. In consultation with whom?
A. Dr. Smith, of Irvington.
Q. Where was Mr. Treftz living at that time?
A. I think it is called Clinton Turnout; it is in the suburbs of Newark.
Q. You knew him?
A. I became acquainted with him at that time.
Q. Did he come to your office for consultation?
A. He came to my office in company with Dr. Smith on the first occasion; on the second I met Dr. Smith at his residence, in the vicinity of Newark.
Q. You examined him then?
A. I did.
Q. How long was that prior to his death?

A. Four or five months.

95 Q. And the second consultation was how long before his death?

DEFENDANT'S COUNSEL. Mr. Coult, we do not insist on the point of our second plea; we shall make no question as to the cause of his death.

Plaintiff's counsel stated that inasmuch as there had been some testimony in regard to sunstroke, he intended to show what the actual cause of death was.

DEFENDANT'S COUNSEL. I object to your calling Dr. O'Gorman to rebut something we have not proved and do not intend to prove.

The COURT. I hardly think it necessary to take up time to
96 prove a fact the defendant does not attempt to deny, that this man's death was not caused by sunstroke at all.

DEFENDANT'S COUNSEL. We do not intend to offer any proof of that at all or stand upon it; we insist that if this man stated untruly that he was never sick, then this policy is void; that is the the issue in this case.

Q. Doctor, at the time you saw Mr. Trefz and made this examination —I will ask you this question, counsel may object if he please: Was there any appearance—did you observe any appearance at either of your examinations that he was then or ever had been affected by what is called sunstroke?

(Question objected to by defendant's counsel as immaterial.
97 Admitted. Defendants excepted.)

A. None whatever.

Q. Does a decided sunstroke, doctor, leave upon the subject any signs, any result which is apparent to a medical man on examination?

A. Occasionally it does.

Q. What is that result?

A. It is very hard to describe the general appearance, but the parties who suffer from the effect of sunstroke are very languid in movement and generally have a slow pulse which rises very high on a little excitement and have a depressed and anxious look.

Q. In the eye?

A. A depressed and anxious look; yes, sir.

Q. Doctor, you have observed a number of cases of sunstroke?

A. Quite a number.

Q. Or people that have become overpowered with heat?

A. Yes, sir.

Q. Does that ever happen when there are no results or traces left?

98 A. I know of many cases where there are no traces left.

Q. And no effect from it?

A. And no effect from it.

Cross-examination by Mr. KEASBEY:

Q. How long had you known Christain Trefz before you attended him at the time you spoke of?

A. I saw him for the first time when he came to my office in conjunction with Dr. Smith, of Irvington.

Q. Who had been his physician, do you know?

A. I don't know.

Q. Did you have your attention called by Dr. Smith, or by Mr. Trefz, to the fact that he had sunstroke some time before?

A. I did not hear of it at all?

Q. Then had you any occasion to examine his condition with reference to that subject?

A. I examined his condition generally, not with reference to anything in particular until my attention was directed to that particular thing.

99 Q. When was it directed to that particular thing?

WITNESS. What particular thing?

COUNSEL. To the matter of sunstroke.

A. It never was directed to it at all.

Q. Then at the time you made your examination you had no suggestion from any one that he had some years before had sunstroke?

A. Never heard of it.

Q. If you had been informed by him that he had had sunstroke in 1866, and had been in the habit of guarding very carefully against it for years past, would you have made a different examination of his condition?

A. I don't think I would?

Q. You say that the effect' of sunstroke are often entirely obliterated as life goes on?

A. Yes, sir.

Q So it is not considered a serious or dangerous thing?

A. That depends upon the kind of sunstroke.

Q. Can you give a definition of sunstroke, doctor, in familiar language?

100 A. Well, what is called sunstroke may be produced by other causes than the actual rays of the sun. Intense heat in the summer time in a covered building will produce the same effect as a sunstroke; sunstroke is simply the popular name of a certain condition of the brain which follows exposure to great heat.

Q. It is a brain disease, is it not?

A. Brain disease.

Q. Is it not a characteristic of sunstroke that it leaves behind it a tendency to a certain movement of the hands and arms?

A. I have never heard so.

Q. What are chronic movements of the arms?

A. That is involuntary movements of the muscles.

Q. Are not those movements produced by sunstroke?

A. Maybe; I have never observed them.

Q. If a person has been attacked by sunstroke p'etty severely, is it not necessary to guard against a reoccurrence of it?

101 A. Very much so.

Q. If a person does guard against it, and goes on for five or six years, is he likely to escape the danger at last?

A. I should say so.

Q. And all traces of it disappear finally, with due care?

A. I have in my mind's eye now some half a dozen persons I have seen and attended for sunstroke, and you could not tell now they ever suffered from it.

Q. And yet you would say, would you not, that it is regarded as a serious matter?

A. There are degrees. The severer forms are very frequently fatal; then we have them diminishing down to a mere sense of fullness in the head.

Q. Supposing a man is stricken down in the heat of the summer, remaining insensible, and is confined to his bed for two or three days, and during the summer following suffers from great lassitude and weakness

and is obliged to go away to recruit, would you consider that a—— (interrupted.)

(Plaintiff's counsel objected.)

102 The COURT. It is only a supposed case.

Q. Regarding it as a case supposed, doctor, would you consider that a pretty serious matter?

A. Most decidedly.

Q. Would you consider it a disease of the brain?

A. An affection of the brain.

Q. Would you consider that if a man had had sunstroke a year before, which had rendered him unconscious for a day or two and required such care and treatment, that he could truly say he had never been sick?

A. I consider sunstroke more an accident than a disease.

Q. If he had said he never suffered from any serious injury?

A. Well, of course, if he had said that, and had suffered from sunstroke, I should consider that he did not represent the case fully.

Q. Do you know Atkins' Science of Practice and Medicine?

A. I have heard of it.

103 Q. Is it a good authority on medical subjects?

A. I should say so.

Q. Is Dr. Clymer a man of authority?

A. Of good standing.

Redirect exam't'n:

Q. Suppose one of your patients, who is an active man, in the middle of summer, in August, should be overcome by the heat so that he was obliged to leave his business for a day or two, and then immediately resume his business, and from thence on continued his business without any change further than that, would you consider that he had been afflicted by sunstroke to amount to anything?

A. I would not consider he had had a severe attack of sunstroke.

Q. And then, after that, if you saw no further indications of it on his person at all?

A. I should think the influence had passed away?

Re cross examination:

104 Q. Doctor, if you heard a man say that he had had sunstroke; that he knew what it was, and did not want to have it again, and was in the habit of wearing a cabbage leaf in his hat in order to guard against it, and heard him blowing about it, and cautioning other people about it, saying he had been stricken down, and was unconscious for some time, and did not want such an attack again, would you consider he had had a pretty severe sunstroke?

A. I should think a person who had had only a slight attack of sunstroke, he would be very prudent to guard against it.

Q. Is it always so dangerous?

A. It fills a person with apprehension immediately.

Q. Justly?

A. I think justly.

Q. Are not persons who have been afflicted more susceptible to other diseases?

A. I won't say more susceptible to other diseases, but more susceptible to the influence of the sun on any exposure.

105 Q. Are not the secondary effects such as to rather undermine a man's constitution?

A. When a severe sunstroke afflicts a person, I won't say it under-

mines the constitution, but it produces a train of symptoms which makes them unfit for business, and unable to go around. I know a person now who has not done anything for three years on account of sunstroke.

Q. May not brain disease be one of the sequentary effects of sunstroke?

A. That I cannot give you a sufficient answer on. I have not had very great experience on that point.

PLAINTIFF'S COUNSEL. I propose to ask the doctor what was the cause of Mr. Trefz' death.

The COURT. You can prove that fact.

By Mr. COULT:

Q. State to the jury what you found to be the matter with Mr.
106 Trefz on examination, and what you afterwards said.

A. When I first examined him I found a stricture of the *as*'phagus.

Q. Did you thoroughly examine him at that time?

A. I did—examined him all over.

Q. That, if I understand it, doctor, is an affection in the throat, pretty well down to the stomach?

A. That tube which conveys the food from the mouth to the stomach. I call it in medical language the *as*'phagus; it is generally in common language called the gullet.

Q. That was closing up?

A. Yes, sir; partially closed.

Q. You saw him soon after?

A. I saw him two or three week' after.

Q. And the patient died from starvation?

A. Starvation.

Q. He was unable to take food into the stomach in sufficient quantities?

A. Yes, sir.

Q. Is that a disease produced or in anywise having any connection with a person being overcome by the heat?

A. None whatever.

107 The court then took a recess of half an hour, & upon reassembling—

Defendant's counsel also called Dr. DAVID S. SMITH, sworn.

By Mr. KEASBEY:

Q. You are a physician in Newark, or near Newark?

A. Near Newark; yes, sir.

Q. Did you know Christian Trefz?

A. I did, sir.

Q. How long had you been acquainted with him?

A. I have been acquainted with the family and practiced in the family since March 28th, 1872, up to within a couple of days of his death.

Q. You visited him?

A. Yes, sir; I have visited him during the time, and was the family physician for that time.

Q. Have you heard him speak of the sunstroke he had in 1866?

A. No, sir; but if I am allowed to explain, I will say that I recollect him saying Mrs. Trefz was sick at one time—*irre*mittent fever—and
108 was suffering a good deal with fever; her head troubled her a good

deal; she was very week and unable to take much diet; he spoke of taking her off to Sharon Springs; he said he had been there; had been troubled about his head. I could not say whether he said he had had sunstroke or not; that is all I heard him say about going to Sharon Springs; I cannot say whether he said he had had sunstroke, but I distinctly remember his speaking of his trouble about his head.

Q. Why do you not remember whether he used the word "sunstroke"?

A. Because I have heard the company have been trying to get that excuse in, and I cann t tell whether I heard of it before or afterwards—I think since the trial has come on.

Q. You are sure he said he went to Sharon Springs for some trouble in his head?

A. Yes, sir; but I don't know whether it was sunstroke or not. I don't think I knew he had sunstroke until the trial commenced.

109 Q. Can you, by an effort, recall what kind of trouble about his head he spoke of?

A. No, sir.

Q. When he spoke about the trouble in his head, would it not be natural for him to tell you how the trouble arose?

(Plaintiff's counsel objected.)

Q. Didn't he do so?

A. No, sir.

Q. What did he say about Sharon Springs?

A. All I remember him saying now was that he would like Mrs. Trefz to go to Sharon Springs; he had been there once for trouble in his head.

Q. Did he say whither it did him good or not?

A. Yes, sir.

Q. What did he say?

A. He felt much better, and thought it would do Mrs. Trefz good.

Q. Did he say how long he remained?

A. No, sir.

Q. Do you know about Sharon Springs, whether it is a place for invalids?

110 A. I have some patients going there, troubled with skin disease.

Q. Don't you advise people to go there, sometimes?

A. No, sir; unless they are troubled with skin disease.

Cross-examination by Mr. COULT:

Q. You attended the family?

A. I attended the family; yes.

Q. And you attended Mr. Trefz in his last illness?

A. I attended Mr. Trefz; I was called to see Mr. Trefz; I think it was October 3rd, 1875, and he spoke to me about some trouble with his throat; he was unable to swallow; two years, about, before that I attended him for inflam'atory sore throat, which confined him to the house for two days; that was all the sickness Mr. Trefz had while I knew him those four years; the children had dip'theria, sore throat, and he was up a good deal of the time and got sore throat, and my impression is he was confined to the house for two days; that was about two years

111 before his death, at the time the children were suffering from sore throat. I think that was the only time I prescribed for Mr. Trefz, except when called October 3rd, 1875, to see him about his throat. He was unable to swallow. I told him I was unwilling to examine his throat unless it was in consultation with some other physician; and he

said he did not know how to be home, he was busy then every day in New York. I suggested Dr. O'Gorman, and told him I would meet him at Dr. O'Gorman's office on his return from New York the next day, which was October 4th. I went with him to Dr. O'Gorman's office and made a full examination of his case; after he left, Dr. O'Gorman and I consulted in regard to it, and I treated him from that time until within perhaps—well, it may be a month of his death, but then I saw him during the time every other day, sometimes—sometimes twice a week, up to within a few days of his death. I think February 22d was the last day I saw him.

112 Q. You did not state the result of the *result of the* examination?

A. The result of the examination was that we discovered stricture of the *os*'phagus, as Dr. O'Gorman stated.

Q. Which was the cause of his death?

A. Which was the cause of his death.

Q. You knew him, then, for several years?

A. I saw him—I was going to say every day—every two or three days during that time. I had known him before that time, when Mr. Trefz lived in Clinton place, but had no acquaintance with his family before that time.

Q. Was he an active man?

A. Yes, sir.

Q. Doing a large business?

A. I should judge.

Q. Did you observe any indications that he had been afflicted by what is called sunstroke?

A. No, sir.

Q. In any way?

A. No, sir.

Q. Have you had any of the agents of the company come to see you?

A. I don't know whether it was counsel or agent that came to
113 see me on Saturday last to interview me in regard to Mr. Trefz' death.

Q. Was that the first time?

A. The first time.

Redirect examination:

Q. What is the sequalia of sunstroke?

A, I have one case in my eye now which was struck, I think, four years ago, in August—during the warm weather—unable to go out—sometimes obliged to lay in bed—least attempt to get up seized with dizziness—has to lay back, or sometimes swoons away.

Q. Does it pass away sometimes?

A. Yes.

Q. Entirely?

A. Entirely.

Q. This case you speak of may in time pass away?

A. No, sir; it will never pass away.

Q. It depends upon the nature of the disease?

A. Exactly; upon the severity of the disease.

Q. Do you consider it possible for a man to have had a serious
114 case of sunstroke and yet get entirely over it in four or five years?

A. Yes, sir.

Q. When you saw Christopher Trefz, did you consider him in perfect health?

A. Yes, sir.

Q. That was in 1872?

A. Yes, sir.

Q. Yet he may have had sunstroke six years previously, seriously, and have got over it?

A. I don't think he could, as he went through the sun as he did, in open wagons, &c.

Q. Might he not have had one and the effect passed away?

A. Might.

Q. If he had been very careful to guard himself in hot weather and took care of himself?

A. I should think it might.

Q. Have you not heard of his carrying a cabbage leaf in his hat?

A. No, sir.

Q. You don't know, then, that he was in the habit of blowing, as Mr. Schimper says, in regard to sunstroke?

115 A. Not to me. I don't think he ever spoke the word sunstroke to me in the world; and he might, but I don't remember it.

Q. When did you first know him?

A. I knew Mr. Trefz—I could not tell you the time, Mr. Keasbey. I knew the family, or heard of Mr. Trefz, or thought that was his name, by enquiring what that man's name was that was driving; he generally drove rapidly; sometimes he drove slow.

Q. When was that?

A. I think 1870 or '71.

Q. You did not know him when he lived in New York?

A. No, sir.

Q. Nor for four years after this alleged sunstroke?

A. I knew him. I should say about 1870 was the first I knew of such a man as Mr. Trefz, by enquiring who that man was driving to his business, but I did not know him to speak to, or the family, until March 28th, 1872.

116 Recross-examination:

Q. I understood you to say you saw him frequently while you were his physician?

A. No, sir. I have seen him getting up hay in hot weather that I could not stand. I have seen him in the garden when I would not have been there for a hundred dollars a day.

Q. I understood you to say that there was some class of the disease which would leave no symptoms and not affect the health; and then, again, it might be serious and would affect the health?

A. Yes, sir.

Q. Like any other class of disease?

A. Yes, sir. I have a casei n my eye; he was unconscious for four hours, recovered, and in the course of a week went to his daily business; two weeks after he got on an express wagon, and has been driving an express wagon in the city of Newark ever since. That was about eight years ago.

117 Further redirect ex'm't'n:

Q. Do you know who was his physician in New York?

A. No, sir.

Q. Did he tell you?

A. No, sir; I never learned who his physician was in New York.

Defendant's counsel also called Dr. E. W. DERBY, sworn:

Q. Doctor, were you physician of the Knickerbocker Life Insurance Company?

A. Yes, sir; for ten years past.

Q. Do you remember seeing Christopher Trefz when he came to revive the policy that had lapsed?

A. Yes, sir.

Q. Do you know when it was?

A. It was in March, 1871.

Q. (Showing witness a paper.) Will you look at that paper and tell me how you can tell it was in March, 1871?

A. It is so written there.

Q. What is that paper?

Q. It is a memorandum that I made at the time I examined
118 him, when he was sent up to me concerning the reopening of his policy.

Q. Was it signed by him?

A. Yes, sir; that is his signature. (Indicating.)

Q. What did you do with this memorandum?

A. I pinned it to the examination.

Q. Well, that is your memorandum of the result of your medical examination?

A. Yes, sir.

Q. With the date upon it?

A. Yes, sir.

Q. Did you examine him at any other time than that to your knowledge?

A. Yes, sir; when the policy was issued.

Q. When the original was issued?

A. Yes, sir.

Q. Were you there then?

A. Yes, sir; as you see by the application.

Q. Did you make any examination of him when this new policy was issued?

WITNESS. You mean the change?

119 COUNSEL. The change.

A. No, sir.

Q. Was there, to your knowledge, any medical examination made when the change was made?

A. No, sir.

Q. It rested on the original?

A. Yes, sir; there was no necessity.

Q. Then you are the very physician who took this identical examination?

A. Yes, sir.

Q. Were those answers made by him to the enquiries?

A. Yes, sir; and then I take them and question them and ask them if they are correct?

Q. Did you, in point of fact, make him understand the nature of those questions?

A. Yes, sir.

Q. Did you receive and truly take down his answers?

A. Yes, sir.

Q. I don't mean take them down in your own handwriting, doctor, but see that they were explained.

120 A. I verified them by putting my name after they were put down.

Q. And after he had signed it and you had made the explanation. Is that his signature there? (Pointing to paper.)

A. I suppose it is; it answers to the other signature there. (Indicating a paper.)

Q. Do you know why it is written there?

A. Yes, sir; to identify the man—to know it was Christopher Trefz that was examined; the person was a stranger to me when I examined him; I asked him for his signature.

Q. What did you write down then as the result of the examination? Read it to the jury.

A. (Read.) "Has some hesitancy in his speech which he and a friend with him say is natural," &c.

Q. Was there anything else called to your mind then than that?

A. There could not have been, or it would have been stated there, sir.

Q. Did he give you any information as to his previous condition?

121 A. He gave me to understand that his health had always been good; that he had had no sickness that amounted to anything, or else he would not have received the policy.

Q. Will you state what occurred, as far as you can remember, doctor? You have a great many of these of course; state what occurred when that examination took place.

A. Mr. Treffs came to my room with a—— (stopped.)

By the COURT:

Q. You are speaking now of the first examination?

A. No; I am speaking of the reopening.

Further direct:

Q. I am speaking of the reopening?

A. Yes, sir; he came into my room with that piece of paper in his hand—either he or the person with him had that piece of paper in his hand—and handed it to me; he had been to the cashier, and the cashier wrote his name on it and sent him to me, and I knew from that

122 that they wanted to know his condition of health, as it was past the day on which he should pay his premium. I made an examination of him and questioned him and made that memorandum upon him, taking the subject matter to Mr. Lyman, the president, talked it over with him, and he said to reopen his policy.

Q. Can you remember any other matter relating to any disease or affection other than what appears on the paper that occurred at that time?

A. I put that down as to what I observed out of the way which may have been something or nothing. Of course I noted it, and questioned him concerning it.

Cross-examined by Mr. COULT:

Q. Doctor, you are the official examiner of the company?

A. Yes, sir.

Q. And have your office in their building?

A. Yes, sir.

123 Q. And are paid by them?

A. Yes, sir.

Q. And so much by the insured?

A. No, sir; the insured have nothing to do it; my remuneration is from the company.

Q. You look to the company for it?

A. Yes, sir.

Q. I understand you to say that the first time you saw him was after the policy had lapsed?

A. No, sir; when the policy was originally issued I saw him.

Q. And examined him?

A. Yes, sir.

Q. And made out the report?

A. Yes, sir.

Q. Have you got it?

A. It is there, on the back there.

Q. Is that the only report you made?

A. Yes, sir.

Q. Did not you make it separate?

A. No, sir; I put my name to it as confirming the above examination.

Q. Then you examined him?

A. Yes, sir.

124 Q. Took the color of his eyes, his complexion, and got his chest measure? Your idea was to certify to the things after examination?

A. Yes, sir.

Q. And you certified that there was not, at that time, existing any disease of the head, external or internal, or any predisposition thereto?

A. Yes, sir, as far as I could see.

Q. You made up your mind he was all right?

A. Yes, sir.

Q. Did not you rely on your skill as a physician?

A. Well, a great deal depends on the representations a man makes you.

Q. Did you not rely upon your skill as a physician to detect the existence of disease in him?

A. Of course I do in a measure, sir.

Q. If his brain was diseased you would see some traces of it, would you not?

A. Not necessarily; no, sir.

Q. You did not see any traces of it?

A. No, sir.

125 Q. Then it might be diseased, and you know nothing about it?

A. Yes, sir.

Q. Could it be much diseased and you know nothing about it?

A. Not particularly.

Q. You looked at his eyes?

A. Yes, sir.

Q. Were his eyes all right?

A. Yes, sir.

Q. You did not see anything about him that indicated any disease of the brain; you certified you did not?

A. Yes, sir.

Q. That was when the policy was issued?

A. Yes, sir.

Q. When he came back to have the policy reopened, as you say, that is, upon the lapsing of it, all you saw was that he hesitated in his speech?

A. Yes, sir.

Q. He was a German?
A. Yes, sir.
Q. And expressed himself with some difficulty?
126 A. Yes, sir.
Q. Is it not a very important element in your inquiries?
A. Yes, sir.
Q. The partie's *one* statement as to his condition and prior health?
A. Yes, sir.
Q. Are you so wise that a false statement of your patient can never mislead you?
A. No, sir.
Q. Are you not very likely, with all the medical skill you may have, to be mislead in a general examination?
A. Oh, yes, sir; where—— (interrupted.)
Q. By a false statement of the party?
A. Yes, sir.
Q. Did you observe, when you came to make this medical examination and report, that he himself had stated he had never been sick?
A. He so told me.
Q. He stated it in the paper, and so told you?
A. Yes, sir; I always questioned them.
127 A. Yes, sir.
Q. You made the same examination over again?
A. Yes, sir.
Q. You went over the same thing exactly?
A. Yes, sir.
Q. And you were satisfied he was a good risk then, were you not, so far as you could observe?
A. No, sir; I was not perfectly satisfied, as that memorandum shows.
Q. You saw there was hesitation in his speech, but could not see any cause of it?
A. No, sir.

Redirect:

Q. Does the result of your examination as a physician oftentimes depend upon the statements of the parties examined as to their symptoms and feelings?
A. Oh, yes, sir.
Q. Do you not, in order to form a diagnosis, take pains to get the partie's own account of himself?

128 By PLAINTIFF'S COUNSEL:

Q. You say he told you he had never been seriously ill?
A. Yes, sir; he had never had anything the matter with him of any account; never been seriously ill; to all intents and purposes enjoyed good health.

Further redirect:

Q. Never had anything of any account?
A. Yes, sir.
Q. If he told you that in the previous summer, in the summer of 1866, he had been taken by sunstroke while at work and been unconscious and shortly afterwards gone to Sharon Springs for trouble in head, would you have made a more careful examination?
A. I would have declined to recommend the reopening of the policy.
Q. Would you even if, to your medical eyes, he exhibited no symptomss of disease?

129 A. If anyone told me they had had sunstroke which was moderately dangerous I should decline to recommend him as a risk; that ends the matter.

Q. If this man wrote down here that he was never sick and concealed the fact that he had had sunstroke in 1866, which caused him to go to recruit for trouble in his head at Sharon Springs, did he not obtain that renewal by such concealment?

(Plaintiff's counsel objected to the question as improper.)

Q. Would you have renewed that policy or recommended it to be renewed if you had known he had concealed that fact; that is, only putting it in other words?

A. No, sir.

Q. That last statement in your examination is, "Do you recommend the acceptance of the risk"?

Q. Yes, sir.

Q. What was that founded upon?

130 A. His representations and the examination I made.

Q. How would that action have been varied by the statement that he had had sunstroke in 1866?

A. I would have written it across the application and written declined across the outside.

Q. Are not sunstroke stricken people good risks?

A. I would not recommend the insuring of them.

Q. If a sunstroke had been of such a character as to render a man insensible, even for a brief space of time, would you consider that as affecting his risk?

A. Yes, sir.

Recross:

Q. If a man came to you with a paper made out for application to a life insurance company, and you saw that he had stated in his

131 application that he had not any disease of the eyes, if that was a question, and on looking at his eyes you found them seriously diseased, would you take his statement and recommend him as a risk?

A. No, sir.

Q. Now, I understand you to say that if he had been seriously affected by any sunstroke you would have detected it?

A. I did not say so.

Q. Would there have been any indication of it?

A. Not necessarily.

Q. Do you think he might have been seriously affected and not exhibit any smyptoms of it even though it only occurred a short time before?

A. Anything might have occurred.

Q. Would it have been likely to have occurred?

A. From my knowledge of sunstroke I should say it might.

Q. And not leave any trace of it at all?

A. No, sir.

132 Q. How, then, would it affect a person?

A. If it left no traces it would not affect him.

Q. If it lest no trace it would not affect him?

A. There would be no effect perceptible.

Q. Wouldn't you call that a serious sunstroke?

A. I could not say how seriously it had been, not having attended him at the time.

Q. Supposing you were called upon as a physician to make a medical

examination of a man who had a sunstroke last week and you saw no traces of it at all?

A. I should think he had very little of it.

Q. You would not think it a serious matter?

A. No, sir; not if it was last week.

Q. Suppose it had been six months before?

A. Well, it is a difficult matter to suppose time, sir.

133 By Mr. KEASBEY. Mr. Coult, the proofs of loss are in evidence, are they not?

By Mr. COULT. Yes, sir.

By Mr. KEASBEY. What papers were they you offered?

By Mr. COULT. Policy of insurance and receipts are the only papers, as far as I know, that are in evidence, and the proofs of loss you produced and a notice.

By Mr. KEASBEY. Do you offer them?

By Mr. COULT. I do.

By Mr. KEASBEY. Then I offer in evidence the two applications of the original policies, two original policies with the surrenders attached, the two applications for renewal or exchange of policies made August thirtieth, 1873, and the physician's memorandum, made March eight-

134 eenth, 1871.

Defendant rests.

Plaintiff's counsel recalled Dr. O'GORMAN; sworn.

Examined by JOSEPH COULT, Esq.:

Q. Dr. O'Gorman, suppose a person had been seriously affected by sunstroke or overheating in August, 1866—Oh, one moment; what I want to ask you, doctor, is this: Whether a man—if a patient had a severe sunstroke in August, 1866—whether evidence of that or traces of that sufficient to be observed by a medical man on a medical examination would appear in 1871?

By DEFENDANT'S COUNSEL. I object to the question as immaterial, and if it is taken, it will be taken subject to objection already made.

By the COURT. Ask the question.

135 A. I could not give a positive answer; there might or might not be evidence of the attack.

Q. The question I asked I suppose you understood fully—if it was a serious case?

A. I speak of a serious case.

Q. Whether it would exhibit symptoms of it?

A. It might or might not.

Cross-examined by Mr. KEASBEY:

Q. Might a man have a serious attack of sunstroke in August, 1866, and then come to you as a physician in March, 1871, nearly five years afterwards, telling you that he had never been sick, and you be unable in your *in your* examination to detect any traces of that sunstroke?

A. Certainly; there might be no traces whatever.

Q. Would you not be less likely to discover it if the man himself asserted that he never had it?

A. Presumably.

136 Q. Don't you depend a good deal on patients' own statements?

A. To a certain extent we pay attention to what they say; when their statements are corrobberated by our examination we come to our conclusion.

By PLAINTIFF'S COUNSEL:

Q. You don't take their statement about the look of their tongue or the look of the eyes?

A. No, sir.

Plaintiff's counsel recalled Mrs. CHRISTIANA TREFZ.

By Mr. COULT:

Mrs. Trefz, do you know anything about the statement that has been made in regard to your husband having been overcome by the heat or something of that kind?

A. As I stated yesterday, he was sick for two days once; he did not feel well. He came home and said he was overcome, he thought, by work and the heat. I offered him his dinner, and he said he did
137 not care for anything to eat.

Q. I want to ask you this question: Do you know or did you see, or was there any evidence to show he had been insensible, or anything of that kind?

A. No, sir; he came home alone.

Q. Where from?

A. I think it was from Hoboken, where he had a farm.

Q. After that, did anything occur?

A. He stopped there awhile, and after that he eat his dinner and went off to his work again the same day, and then for two days he said he did not feel right well; then he went about his business as usual.

Q. Something has been said about his going to Sharon Springs. What was there about that?

A. Well, we went up there, I think it was three times. He used to buy hops up there.

Q. Something has been said about his going there at the time. Do you know whether he went?

A. Yes, sir; I think he went right after that.

138 Q. How long after that?

A. I cannot tell as to the day; about a week or so, I think, afterwards.

Q. How long was he gone, do you know?

A. I guess he was gone a week or ten days. He went first to Albany; did his business—attended to his business, and went further on, where he had more business; called at Clyde, where he used to buy malt; then he wrote to me to come up—I suppose close within a week or so. He thought I should come up there; it would do me some good; and when I got up there he came home again and attended to his business, I suppose. I suppose the book-keeper knows more about it than I do. Then he came up again.

Q. How long did he stay away after he came home and you went up?

A. About a week, I suppose.

Q. He went back to New York?

A. Yes, sir.

Q. Then he came back again?

A. Yes, sir.

139 Q. How long did you stay?

A. I stayed altogether four weeks after he left me.

Q. What were you staying there for?

A. Well, we had a great deal of business during the winter time, and I felt kind of worn out.

Q. You were taking rest?

A. Yes, sir; I was the book-keeper and attended to the indoor business; he attended to the outside business—wagons and horses, and men.

Q. Now, did your husband complain seriously of this matter?

A. Not anything seriously; only said he did not feel well.

Q. When he was at Sharon Springs, was anything said about it there?

A. Not while I was there; he did not complain to me.

Q. He came on and attended to business while you were there?

A. Yes, sir.

Q. Did you go on to Sharon Springs again after that?

A. Yes, sir.

Q. What for—recreation and rest?

140 A. Yes, sir; for rest. I had a great deal to do; I was in the house most of the time.

Q. Were there brewers there?

A. Yes; most of the brewers used to meet there to see about how hops looked and one thing and another like that; it is a great country for hops, and of course they see how things must go on.

Q. Something has been said here about your husband protecting his head against the sun?

A. He has done that, but I have done that myself when I used to go out in the garden to work in the sun; done that in Newark.

Q. Put in a cabbage leaf?

A. Anything green.

Q. Did you work yourself?

A. I have worked a good deal.

Q. Your husband worked too?

A. Yes; I guess there is not a harder working man here in this court than he was.

Q. After that did you hear him make any complaint about his sunstroke, or refer to it?

A. No, sir.

141 Cross-examination by Mr. KEASBEY:

Q. Was that the first time you had been to Sharon Springs in the summer?

A. The first time I was there.

Q. The first time he was there in the summer to spend any time?

A. No, sir; he was there before to look after his business.

Q. Had he been there to spend any time, two or three weeks, before?

A. Not that I know of; he would go about his business and come back in about a week, because he went all over.

Q. He went to Sharon Springs as to Albany, or anywhere else on business?

A. Yes, sir.

Q. This time he went to recruit, as he told Dr. O'Gorman, you know?

A. No, sir; he did not tell me.

Q. Oh, it was Dr. Smith. Did you ever hear him talk about the sunstroke?

A. The only time I heard him complain about it was when he
142 came home and said he thought he had overworked himself, and got overcome by the heat.

Q. You heard Mr. Schimper saying he was always blowing about sunstroke?

A. Well, that he might have been, but not in my presence.

Q. How many days did he stay home when he came back from work?

A. I think it was two days after when he fell down; well, he thought he did not feel well.

Q. About a week after that he went to Sharon Springs?

A. About a week after that he went there.

Q. Don't you remember him saying he was engaged in loading malt on Liberty street when he had the sunstroke?

A. No, sir; he often unloads malt, or usually was doing it; we had boat loads come in most every week.

Q. Don't you know that he regularly in hot weather carried a cabbage leaf in his hat?

A. I saw him sometimes.

143 Q. Was he pretty careful about it in hot days?

A. Not that I know of particularly.

Q. Don't you know he used to get cabbage leaves for the men?

A. That I don't know because I had nothing to do with it.

Q. Perhaps he did not want to trouble you about his trouble in the head?

A. That I did not ask him.

Redirect ex'm't'n:

Q. Your husband and you were together in conducting this business, were you not; that is, working together constantly?

A. Yes, sir.

Q. You saw him out and about?

A. All the time.

Q. Out in the sum?

A. Out in the hot sun.

Q. Without his hat on?

A. We had a place here in Newark, a farm, he worked constant; not constant, but off and on, making hay and such like.

Q. As well as at the brewery?

A. Yes, sir; as well as at the brewery.

144 Q. Mrs. Trefz, I believe you stated that you went over with the proofs of loss, and the company refused to pay on the ground that your husband died from the use of intoxicating drinks?

A. Yes, sir.

Q. Did they say anything else?

A. Yes, sir; they said it was a matter of compromise, they didn't wish to pay so much; if he lived longer they would get more money out of him; that is what the agent said upstairs.

Q. They did not suggest anything else?

A. No, sir; nothing else; they did not claim anything else.

Q. When did you ever hear any other defence?

A. That was the day.

Q. When did you ever hear anything about sunstroke as a defence?

A. Not until the court commenced the trial.

Q. Wasn't it not long after that?

A. It is lately. I have heard this not before.

Recross-examination:

Q. What agent was it told you that, do you know?

145 A. Which agent?

Q. You stated an agent upstairs?

A. Well, they referred us to the agent upstairs.

Q. Do you see the man here (pointing to a gentleman in court). Is it that gentleman?

A. I would not be positive; I think he was a smaller man than he; it was up in the front room.

Q. We would like to know who it was said such a thing?

A. Well, there is another gentleman with me who might know; as a general thing I don't look at gentlemen very close to know them again.

Plaintiff's counsel also called DANIEL M. LYON, sworn.

By Mr. COULT:

Q. Mr. Lyon, you knew Mr. Trefz in his lifetime?

A. Yes, sir.

Q. What is your occupation?

A. Brewer.

Q. How long did you know him?

A. Seventeen or eighteen years.

146 Q. You knew him then in New York?

A. I knew him in New York. Yes, sir.

Q. Was he a man of leisure, or did he work?

A. A very hard-working man since I have known him.

Q. All the time?

A. Well I could not say all the time. I saw him probably sometimes once, sometimes twice a week in my first acquaintance, but lately, before he died, right previous, I saw him probably oftener than that.

Q. More than once or twice a week?

A. Yes, sir.

Q. Well, the fact I wanted to get at was this: Was whether he was a man active in his business?

A. Yes, sir. He was an *an* active, hard-working man—a man that was usually late and early.

Q. You were intimately and closely acquainted with him?

A. Yes, sir.

Q. Did you ever hear anything about his having had a sunstroke?

A. Not to my knowledge.

147 Q. Did you see any indication of it at all?

A. I never knew him to have any sickness, what you might call sickness, until this last attack.

Q. The last sickness?

A. The last sickness he had. That is the only sickness I ever knew him to have or heard of.

Cross-examination by Mr. KEASBEY:

Q. You say you never heard him speak about his sunstroke?

A. No, sir.

Q. If you had heard him speak to you or others about it, you would have thought it was true, would you not?

A. I don't know whether I would, Mr. Keasbey. I could not tell any cause why I would not believe it. I have had no cause to disbelieve him.

Q. Is the estate largely indebted to you, Mr. Lyon?

A. No, sir; not at all.

Q. To parties you are interested in?

148 A. Yes, sir.

Q. To what extent?

A. About $20,000.

Q. To the trust company in which you are interested?

A. No, sir.

Q. To other parties?

A. Yes, sir. I will tell the jury, if you like, the reason why. Somewhere about the fall, about this time of the year, two years ago, we had been selling—at least a party I was interested with had been selling him largely, probably $100,000 a year. We always took a collateral mortgage on his property for collateral security; probably at the end of the *h*ear he might owe us $60,000—I say "us" because I am interested, although my name does not appear on the bill. I said the old gentleman was failing, and knowing his condition of affairs—knowing he had made a will which divided the property up, and would probably cripple the concern—I suggested to him that he change his will, and told
149 him my reasons. I told him I could not afford to sell him and trust him so largely. If he happened to be called away, it would necessitate our selling the brewery probably. That was the first intimation I had of his being sick—that last sickness. He said he would change his will. I said, "Your wife has always worked for you; you know you can trust her;" and he said "Yes, I will leave it all to her;" and at my suggestion he willed it all to his wife, with a pledge from me that any advice she might want with regard to the business I would answer; and the day before he died—I think it was the day before—he told me he had got to die, and asked me if I forgot what I had promised. I told him I had not. That is all the interest I had in it—my promise.

Q. You say he was failing in the fall before he died?

A. It was along in October, I say; this throat disease; he was out; he was down at my place.

150 Q. You thought him an old gentleman then?

A. I called him an old gentleman because he was about—I call any gentleman an old gentleman who is about fifty or over.

Q. I did not know but what he had so broken down in health that he looked older than he was?

A. My information was gotten from Dr. O'Gorman.

Re-direct exam't'n:

Q. You have no interest in this?

A. Not a dollar; no more than I have in the welfare of any one in my business. I would like to see them all prosper.

Q. There is nothing depending on this suit as far as you are concerned?

A. No, sir.

Q. Mrs. Trefz has continued to carry on the business?

A. Yes, sir.

Plaintiff's counsel recalled CHRISTIANA TREFZ.

By Mr. COULT:

151 Q. Do you recollect the name of the agent who took the application for the insurance in the first instance, or either of them?

A. I think, from what he said, that he knew Mr. Trefz a long time; but I don't know him personally.

Q. The second one, did you know him personally?

A. Yes, sir; I did. His name is Brimmerhausen.

Q. Do you know whether he was the agent of the company?

A. He stated himself as the agent of the company.

(Defendant's counsel objected to the evidence of agency.)

WITNESS. I don't know, of course, whether he was. He just said he was.

The COURT. If I got the statement of this witness right, she said the last was an old friend of Mr. Trefz, and stated himself to be the agent of the company.

152 WITNESS. I had known him before, and knew him to be the name he represented.

Q. And the name?

A. Was Brimmerhausen.

Q. You saw the name in one of these applications, at the corner?

A. Not particularly.

Q. (Showing witness a paper.) What name is that on the corner of this one?

A. That is Brimmerhausen.

Cross-examination by Mr. KEASBEY:

Q. Mrs. Trefz, where did Brimmerhausen live?

A. I don't know where his residence was.

Q. What was his business?

A. Well, he called himself agent of the company, for the Knickerbocker Life Insurance Company.

Q. Did you ever see him before?

A. I did.

Q. Had you seen him often?

A. Well, I might have seen him may be half a dozen times.

153 Q. What city did he live in?

A. New York.

Q. Do you know whether he had any office?

A. That I don't know.

Q. Did you ever know him to be engaged in any business of any kind?

A. I believe afterwards I knew that he was—(interrupted.)

Q. Before that time, I mean?

A. Before that time I don't know; afterwards I heard he was engaged in the wine business.

Q. Was he not engaged in the wine business at that time?

A. Not that I know of.

Q. Had you ever know' him to do any business for any insurance company before that time?

A. No, sir.

Q. He was an old friend of your husband?

A. Yes, sir.

Q. Did you ever hear anybody else say anything about his business?

A. No, sir.

154 Q. Do you know anything about his condition or occupation except what he himself said at the time when he took this application?

A. No.

Q. When you present when he made this application?

A. He came to our house.

Q. Was it done there or elsewhere?

A. It was done at our house.

Q. Why didn't you sign it yourself?

A. That I don't know; I didn't know about the business before; I had no knowledge of anything of the kind.

Q. Did you see it signed at all?

A. Well, that I would not be positive; he came there and pressed very hard Mr. Trefz to get the insurance, for he never cared about getting insured.

JOSEPH K. RICE (called for the purpose of translating the German application into English) sworn.

(Paper handed to witness.)

155 WITNESS (translating). Name of person for whose benefit the policy was made out, the place of residence, the relationship of the person.

By the PLAINTIFF'S COUNSEL:

Q. Had you not better read it right across?

A. Name of the person whose life shall be insured?—Christian Trefz.

Where he lives?—73 street.

His business?—Malt and hop business.

Date and place of his birth?—Born 21st March, 1820, in Germany.

How old at the next coming birthday?—Forty-eight years, taken at forty-seven; (that means he was nearer forty-seven than forty-eight when insured.)

What kind of a policy he wishes to take out?—That is a life policy, taken for life.

With or without dividends?—With dividends.

If he wishes to pay yearly, half yearly, or quarterly; to which he answers "half yearly." He answers "half credit." The policy made out $3,000.

156 Is the person married or single?—Married.

It says: If the person so insured ever lived in the Southwest or a foreign climate? To which he answers "No." If so, when, where, and how long?

Has the insured person ever been in the Army or Navy; or is it so now? To which he answers "No."

This is asked. If he ever had the small-pox, if so, when?—(This question is in A and B); he answers A and B with no.

Was ever his parents, brothers, sisters, or any close relations to the person so insured, afflicted with spitting of blood, rheumatism, gout, insanity, scrofula, cancer, or did they ever have any other disease tending to shorten his life; when and where? To which he answers, "No." He lost one at sixty-six and other at sixty-eight—father at sixty-six and mother at sixty-eight.

Q. The question is when did his father and mother die?

A. When father, mother, sisters and brothers, he answers, no

157 brothers, or sisters; his father died at sixty-six and his mother at sixty-eight from old age. Which of brothers and sisters living? Two brothers and three sisters. What is their ages?—Forty-nine and fifty-two, brothers; fifty-one, fifty-four, and fifty-eight, sisters. Their health is very good. He is asked whether the person so insured ever had any sickness of the head, or the heart, or the stomach, or the (interrupted).

Q. When you say sickness of the head, is that head or brain?

A. Well, it is the head.

Q. What are the other words?

A. Disease of the brain, the heart, the stomach, the bowels, the kidneys, the bladder, or the sexual organs, or any other, and if so, when, and which, when he had them, and which one had them, his life organs, what we would call his vital organs. The answer to the question is "No." If the person was ever affected with spitting of blood, consumption, asthma, cancer, liver complaint, bro'chitas, rheumatism, rupture,

158 dropsy. The next one is affliction of the brain, crazy, or insane. The next is gout, cramps, hemorr'age. The next is which is an en-

largement of the organ of the throat. I' Europe there is a great many places where most everybody in certain places has this.

Is the person now deaf, dumb, or blind? If so, which? The answer is "No."

Bilious or typhoid fever? The answer is "No."

If the person, at the present time, has any sickness or irregularity? If so, which? He answered "No."

The next is if he has been sober? To which he says "Yes"="Yah." This is the question here: he is asked if the insured person had anything happened to his body—anything happened to him.

By Mr. KEASBEY:

Q. I suppose the same as there, as translated here in the English policy?

A. Yes, sir.

159 Q. Then is it there "They do hereby agree that *that* the above proposal for insurance," &c.? See if it is the same as this (showing witness application in English).

A. It is the same in German—just the same in German as it is in that in English.

What there represents head or brain?

A. "Kopf."

By the COURT:

Q. What is the date of that German application?

A. 25th May, 1867.

Q. And it is to obtain a policy in what sum?

A. $3,000.

The COURT (to counsel). Then it is a counterpart, really, of the one you have here in English?

DEFENDANT'S COUNSEL. I suppose it is the same.

Evidence closed.

160 And thereupon, after the testimony was closed, the judge charged the jury, amongst other things, as follows:

161 GENTLEMEN OF THE JURY: The case has been so ably summed up by the counsel of the parties, that not much remains for me to say. You are to determine all questions of fact. The responsibility of the law rests with the court.

This is an action brought by the widow of Christolph Tretz to recover the amount alleged to be due on two policies of life insurance, which she held in the defendant's company, upon the life of her husband. They were both dated September 6, 1873; one for $8,500, & the other for $2,500. An examination of the face of the papers shows that they were issued to the plaintiff by the company in consideration

162 of her paying an annual premium, in advance, of 461\frac{64}{100}$ on the policy for $8,500, and 125\frac{78}{100}$ on the policy for $2,500. It is acknowledged by the terms of the respective policies that these sums were paid for the first year ending September 6, 1874. The company issued & delivered to the insured, yearly thereafter, what are called renewal receipts, signed by the secretary & president, certifying that the policies had been continued in force for another year, & I regard the production of these receipts by the insured as prima facie evidence at least, that the annual premiums have been since regularly paid. The evidence is undisputed that Christolph Tretz died on the 24th of February,

1876, & that his widow filed with the company proofs of loss on the 10th day of March following. By the terms of the policies the company was obliged to pay the amounts due upon them three months after notice & satisfactory proof of the death of the insured. As no objection appears to have been made to the form of the proof the
163 jury will assume that the notice was regular, & was accepted by the company; and hence, if any liability exists, the sums due to the plaintiff upon the policies should have been paid to her upon the 10th day of June, 1876. The plaintiff states, in her testimony, that when she presented to the company the proofs of death & loss one of the officers interposed some objections to payment on the ground that the deceased had shortened his life by the excessive use of intoxicating liquors, & said that it might be a proper case for compromise, but that no difficulty was stated in regard to the form or mode of the proofs.

The policies on which the suit has been brought were not the only or the first policies that the company had issued to the plaintiff. It appears in evidence that on the 25th day of May, 1867, a policy was issued for $3,000, and on the 18th day of March, 1868, another was issued for $10,000, making the aggregate of $13,000 which the insured had in the company from 1867-'8 to 1873, when the surrender took place & the new policies were made out. The first pol-
164 icies were surrendered on the 30th day of August, 1873, & on that day it appears that a written agreement was entered into between the parties, setting forth the terms & conditions upon which the new policies were to be granted. These agreements are in evidence, & they seem to be a request from the insured & his wife to the company, to issue new policies, & were in these words; "The undersigned, owner of policy No. 16772 on the life of Christolph Tretz, hereby requests the Knickerbocker Life Ins. Company of New York to issue a new policy for $2,500, with premiums payable annually; and in consideration thereof, I do hereby covenant & agree that all the statements contained in the original application & declaration for the said policy were true & valid when made & are hereby made the basis of the contract between myself & the said company, for the new policy hereby solicited." The other agreement is the same in form & asks for a new policy for $8,500. Altho' in the singular number they are signed by both Christina Tretz & her husband, & therefore must be held to
165 be a joint & several agreement on their part that all the statements, in the applications for the first policy, were true & valid when made, & that those statements were considered by them as the basis of the contract between the parties for the new policies about to be issued. The jury will thus perceive the connexion between the old & new policies. The written statement & applications for the former were made the basis of the contract between the parties for the latter.

Now, turning to the latter policies, we find that they both purport to be issued upon the life of Christolph Tretz for the benefit of his wife, Christina, "In consideration of the representations made to them in the application for this policy & upon the faith of which the same is issued," &c. The reference here is not to representations made in any new applications, but to the representations & statements in the original applications, which had been made by the agreement of the parties the basis of the contract on which the new policies were issued.

Looking further into the terms of these policies we find the fol-
166 lowing condition annexed to them, and its importance will be understood by the jury when I state that the whole case, in my judg-

ment, turns upon its meaning. "This policy is issued & is accepted by the assured upon the following express conditions & agreements, to wit," (and here follows a long statement of conditions & agreements, to which it is not necessary to refer, as they have nothing to do with the present controversy, & concluding with the following): "that if any of the statements or declarations made in or accompanying the application for this policy, & upon the faith of which the same is issued, shall be found to be in any respects untrue, then in every such case this policy shall be null & void."

Now, gentlemen, that seems to be a hard condition for the policy-holder, but it is there; and courts & juries in cases of this sort are obliged to ascertain what the contract is, & enforce it, without reference to the parties concerned in the litigation. In other words, there is no place for sympathy. We are not to inquire whether one party or
167 the other has made a good or bad bargain; nor are we to set up our individual judgments upon the question whether it was wise or unwise for the one or the other to conclude such a contract. We are simply to find out what the parties did agree to, & whether either has failed to perform their covenants. When the surrender of the old policies took place, the parties agreed in express terms to make the statements & declarations in the original application, the basis of the contract for the new policies.

You have heard a good deal said, during the trial, on the question whether these statements & declarations should be treated as express warranties, or as mere representations. But under the decisions of the Supreme Court of the United States (Jeffries vs. Life Ins. Co., 22 Wall., 47; Ætna Co. vs. Trance, 1 Otto., 510) which controls this court in the interpretation of the law, it would not seem to make any practical difference in this suit whether they are regarded as warranties or representations. Whether the one or the other, if they are in any re-
168 'pect untrue, they avoid the contract & prevent a recovery upon the policies. The jury will at once perceive the reason of this. It is because the parties themselves have agreed that such shall be the result of any untruth in the statements.

Nor, let it be observed in this connexion, does it matter whether the false statements or the false representations, if any have been made, are, in your judgment, material to the risk or not. The company has determined the materiality of the matter by asking the question. This may seem harsh, but we are not considering that. It is the law of this court that when a party goes to a life insurance company for the purpose of effecting a life insurance, & agrees that every statement which he makes to the company shall be true or there shall be no contract between them, if it turns out afterwards that the statements were false or untrue, the jury have no right to say that they will not regard
169 them because they were not material to the risk. The company in propounding the inquiry *inquiry* made themselves the judges of its materiality, and the individual, in answering falsely, agreed that he should have no benefit under the policy or the contract.

We have now reached the question on which the case turns. Has it been proved to your satisfaction by the defendant corporation that the insured, in his written application, made any statement or representation which was not in fact & in all respects true? The jury must determine this question from the evidence in the cause.

The counsel for the defendant insists that the application, when considered in connexion with the testimony of the witnesses, shows upon its face that there was an untrue statement made; but the diffi-

culty about that is that there is a conflict in regard to the evidence, & the jury must first ascertain what the evidence is before the question of the falsity o' the statement can be passed upon.

170 I hold in my hand one of the written applications of Christoph Trefz & wife for one of the policies of insurance; the other is substantially like it, altho' in the German language. These are the papers that the parties stipulated should be true, & the basis of the contract between them when the policies were issued, on which the suit was brought, & if the statements & declarations therein contained are not true there was no contract to be enforced.

The counsel of the defendant claims that the answer given to the 5th interrogatory is an untrue answer, & must be so regarded by the jury when they come to construe the testimony in regard to the physical condition of the insured before the application was made. The interrogatory was this:

"Fifth. Whether now or formerly, when or how long, or to what degree, have you been subject to, or at all affected by, any of the following diseases?" And then comes a long enumeration of diseases, commencing with A—Apoplexy—in the alphabet—& ending with Y—Yellow fever."

171 He was asked whether he had ever been afflicted with any of these diseases. He replied "no" in one of the applications, & in the other the answer was "never sick"—not written, however, by himself, but by the person who took his application for the insurance.

The counsel for the defendant asked me to charge you that the individual before whom the application was taken was not shown to be the agent of the company. I will say, in reply, that Mrs. Trefz testified that he represented himself to be such agent; but that, standing alone, would not bind the company. I do not know whether he was their authorized agent or not, & I have no recollection of any testimony in the cause which would tend to make them in any wise responsible for h's acts.

The counsel for the defendant further says that the reply "never sick" was an untruth of such a character as to avoid the policy. In considering this you have the right, & you ought to remember that the

172 applicant was not a native born citizen, & that he was not very familiar with the language in which the question was put; he did not speak it with any fluency, & it is fair to assume from the testimony that he did not understand it very fully when spoken to him.

I make these observations because it seems to me that in endeavoring to ascertain the truth or falsity of the answer we ought to look at it in the light of the knowledge & understanding which the individual had in regard to the terms he uses. The question was stated in what to him was a foreign language: "Have you such & such diseases?"—beginning with apoplexy & ending with yellow fever. His reply is reported in the same language—"no"; "never sick." Was the answer false? This much certain is true, in view of the testimony of Dr. Smith, Dr. O'Gorman, the plaintiff, & others, that throughout the insured's life he had been a uniformly healthy man; they said they had never known him to be sick. He was not subject to the ills to which people

173 in ordinary life are subject in the way of acute or bad sickness.

But it is also true that before the applications were filed, about six months before, if you believe the inference of the witness, Schimpler, who inferred that it was in the summer of 1866, from the statements made by Trefz at the time of his re-examination, he was exposed to the rays of the sun whilst at work in the field & was overcome by the heat

in such a manner & to such an extent that he left his work & went to his house. The defendant insists that such a fact was sufficient to make void the policies, because it shows that a man could not truly say he was "never sick" who had suffered from such a sunstroke.

Now, gentlemen, you cannot decide this question fairly without carefully adverting to all the testimony on the subject.

The first witness to whom you will turn, Schimpler, was for several years the bookkeeper of the insured. He was offered by the de-
174 fendant, necessarily, I suppose, because it was difficult to get testimony in matters of this nature without calling on the persons wh have been intimately associated or connected in business with people afflicted in this way. I think it is proper for me to observe that Mr. Schimpler produced upon the court the impression of desiring to speak the truth. He was not prejudiced in favor of the company, al-
tho' they called him, & I did not see any disposition on his part, al-
175 tho' you must be the judge of that, to make any statements merely to favor the plaintiff. He says that the first he ever heard anything about a sunstroke was about the year 1872. He is not sure of the year, however; but it was at the time when he had neglected to pay the premiums due upon the policies, & had gone to the company's office in New York with Mr. Trefz to apologize for his carelessness & to pay the premiums. Dr. Derby, the medical examiner of the company, says that it was in March, 1871, & fixes the date by a memorandum made at the time. The officers refused to renew the policies without a new examination of the insured. They were sent to the medical examiner of the company, & the doctor asked the witness whether he had any knowledge of Mr. Trefz's ever having a sunstroke. He thinks the doctor was led to ask him such a question from seeing some peculiar movements about the arms of the insured, and that the inquiry was made of him because he was more familiar with the English language
176 than Mr. Trefz. The witness had never heard that Mr. Trefz had ever been thus affected; but on inquiring of him, he learned that he had had a sunstroke some time before. He fully described to the medical examiner the symptoms; explained how he had been affected, & when he had concluded, the doctor, who was doubtless the agent of the company in the examination, said, "Oh, that makes no difference, if that is all," & passed him as a fit subject for insurance after the attack had been described & explained. When this testimony was given, I presume that every gentleman upon the jury at once came to the conclusion that if it was true, & if the agent of the company regarded the attack, when he was told of it, of too little consequence to hinder the renewal of the forfeited policies, it was now to' late for them to come forward & say that it was of so serious a character & nature that he ought never to have been insured at all; in other words, that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it & take the money of the insured
177 for a renewal of the policies, and after his death to avoid the payment of the loss, on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply of "never sick." But is it true that this statement & explanation was made by Mr. Trefz to the examiner? I called the attention of the counsel, when he was summing up the case for the defendant, to the fact that when the doctor was afterwards called as a witness, he did not, in direct terms, contradict the testimony of Schempler. His reply was that the law did not allow him to offer a contradiction to his own witness. This is undoubtedly the general principal, for

the obvious reason that where a party tenders a witness in a cause, he by that act assumes that he is worthy of belief; & it would not conduce to the ends of justice to allow such party to select those portions of his evidence that are favorable to him, & and ask the jury to rely upon its truth, & then to prove that he should not be believed as to other portions that seemed to make against his case.

178 But where the testimony of a witness has surprised the party offering him, there are cases in which the law allowes of his contradiction; whether this was one of such cases it is necessary for me to say, but I think the defendant should have called the attention of the examiner to the interview between himself & the insured, & should have been asked whether the witness had stated the whole truth in regard to the conversation between them, & left the counsel of the plaintiff to have made objections if he saw fit.

But although no attempt at direct contradiction was made, the witness was asked a number of questions, the drift of which was to create the impression that no such conversation took place. He stated, for instance, without qualification, that if he had known about the sunstroke, as he then understood it, he would not have recommended the renewal of the polices of insurance. It is for the jury to decide in this state of the proof, where the truth lies. In determining it, they must not

179 lose sight of the fact that the defendant claims that the assured stated that he had received a sunstroke, & that his conduct in talking about it & in putting cabbage leaves in his hat, &c., indicated his apprehension of a return of the trouble. They must also determine whether it is probable that the insured would have pursued this course of conduct if he had considered the attack of so alarming a character as to make his declaration that he was "never sick" an untruth, which would defeat his policies of insurance.

You must also bear in mind the statement of the witness Scheupler, that the insured said to the doctor that he was rendered insensible by the sunstroke. Consider, in connection with this, the testimony of the plaintiff, Mrs. Trefz, who stated that her husband came home alone; that he did not seem to be seriously affected; that he said he had been affected; that his head had been hurt by the heat; that he had been compelled to stop work & come home; that at first he declined

180 to eat his dinner & that he did eat afterwards & return to his business. All this is only material as conveying to you a knowledge of the extent of the injury received by him. It is not every affection of the head, from the heat of the sun, that constitutes sickness. When a man says that he was never sick, he does not mean that he never had a headache, or that he was never affected by the heat of the sun, or that he never had any of the ills that flesh is heir to. It may have been meant in the present case, that the insured had "never been sick" with any of the long list of diseases which had just been enumerated to him.

I think I may properly say to the jury that there are affections of the head caused by the heat of the sun that may be denominated sickness, & that there may be other affections of the head thus caused which are not sickness. It is for you to determine the extent of the injury received by Mr. Trefz, & whether it was of such a character or nature as to make his reply to the interrogatory a falsehood or not.

181 The question was put to Dr. O'Gorman by the defendant's counsel, as to what he considered a sunstroke, & his reply was that he regarded it rather an accident than a disease. What I suppose is true in regard to the matter is that there are some affections of the

head brought on by exposure to the sun which would make the reply of the insured an untruth, and that there are other affections produced in the same way of such a light character as to render his reply proper & fair. It is for the jury to say from the evidence, in regard to the extent, nature, & kind of sickness, whether the attack which the insured suffered was of the character to make his answer, "never sick," a falsehood.

The burden of proof here is upon the defendant. The company sets up the defence & the jury must be satisfied from the evidence that the untruth of the statement has been established; otherwise their verdict should be for the plaintiff for the amount due upon the two policies, with interest commencing three months after the filing the proof
182 of death and loss.

But if you believe from the testimony that the insured, whether willfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the wife & husband entered into, on the ground that it would be a hardship to the widow. People must not make bad bargains outside of the court room & then come here expecting the court & jury will relieve them from the consequences. But you must be satisfied of the folsity of the statement made by the insured before you can find a verdict for the defendant.

I will now refer to the request of the counsel of the defendant to make certain charges in regard to the law of the case. I will read them & then state what I charge in regard to them.

183 I am requested to charge—

1. That the statement contained in the original application & declaration for the respective policies, in place of which the policies in suit were issued, enter into & form a part of the now policies, and if any of the statements contained in either of the said applications are found in any respect untrue, the policy issued upon the application containing such untrue statement is void, and the plaintiff cannot recover thereon.

That I have already charged in substance, & I repeat it.

2nd. That altho' the policies do not in express terms make the application a part of the policy, yet inasmuch as they declare that they are issued in consideration of the representations made in such applications, & on the faith of the same, & upon the express condition that if any of the statements made therein were in any respect untrue, the policies should be void; these stipulations make the truth of the facts
184 a matter of contract obligation on the part of the insured, as if the statement had been embodied in the policy itself; &, therefore, the contract must be held to comprehend both the policies & the applications which they refer to as their basis.

I do not perceive that the second differs materially from the first except in the phraseology. & I charge it to be the law of this case.

3d. That being so refer'ed to in the policies & made the basis of the contract the statements in the applications were warranties; & if any of them, whether material to the risk or not, were untrue in any respect, either from design, mistake, or ignorance, the plaintiff cannot recover.

I will pass that for the present; I think there is a request further down that covers the ground.

185 4th. That where the policy & applications are brought together by the distinct reference of the former to the lat'er, in the terms employed in this case, there is an express agreement, not only that the statements are true, but that they are to form a part of the contract, &

thereby the statements become warranties. It is only where there is no such distinct identification of & reference to the application that the statements can be held representation & not warrenties.

I will pass that also for the present, as I think there is something further on in reference to it.

5th. That whether the statements are to be regarded as representations or warranties, or even as neither, yet, being expressly made the basis of the contract, they must all be true, as the insured has agreed that they shall be; and further, that the faithful performance of
186 this agreement is essential to the existence of liability on the part of the company.

I decline to charge the third & fourth requests, because I am not prepared to say that these representations are warranties, nor do I think it material to this case whether they are regarded as one or the other. This fifth request covers the whole ground, & I charge it; whether the statements are treated as representations or warranties, or as neither, they have been made expressly the basis of the contracts & must all be true, for the insured has agreed that they shall be, & the faithful performance of the agreement to the existence of liability on the part of the company. I held that if they are not true the plaintiff cannot recover.

187 6th. That where it is expressly covenanted as a condition of liability that the statements in the application are true, & their truth forms the basis of the contract & false answers are made, it is of no consequence whether the statements are material to the risk or influence the mind of the insurers, & these questions are not for the determination of the jury.

I have already so said in my charge, & I repeat it.

7th. That under the provisions of these policies & the undisputed facts of the case, the only question for the jury is the truth or falsity of the answers; & that if the answer "never sick" was in point of fact untrue, the plaintiff cannot recover, whether the injury was material to the risk or not?

I charge that, gentlemen, to be the law in this case.

8th. That by the undisputed medical evidence of the plaintiff's
188 witnesses sunstroke is a disease of the brain, often fatal, tho' sometimes entirely cured & its effects obliterated.

I do not charge that, because it was not the undisputed medical testimony, as I understand it. I believe the question was put to Dr. O'Gorman whether it was not a disease. & he replied that he would rather call it an accident. I decline to charge it, because I do not consider it undisputed medical testimony.

9th. That if, within one or two years, the insured had such disease, his answer "never sick" was untrue, altho' he had entirely recovered from it long before his death, or even at the time of his application.

I decline to charge that, becaus' I do not think it is true, as I have endeavoured to state in my charge.

10th. That it is proved by witnesses unimpeached & uncontradicted that the insured frequently stated that he had had sunstroke in
189 1866, & guarded carefully against its recurrence long after the insurance was effected; & that unless you can find something in the case which renders these statements incredible the jury are bound to treat the fact as established in the cause, & on the principles above asserted to find for the defendant.

I decline to charge that, because I do not wish to interfere with questions of fact before the jury.

11th. That there is no evidence that the application——

By the COUNSEL OF THE DEFENDANT: That has been already charged; the request may be omitted.

12th. If the jury believe the testimony of the witness, J. H. Schempler, the defendant is entitled to a verdict in its favour.

I decline to charge that as I rather think his testimony, taken altogether, made for the plaintiff rather than the defendant.

190 13th. If the answer of Trefz to any question was untrue in the sense in which such question & answer are commonly understood, the policy is void, even though the answer may have been true in the sense in which he understood the question.

That will hardly do, & I decline to charge it.

By the COUNSEL OF THE DEFENDANT: I desire to except to the ruling of the court refusing to charge the last but one request, & to the terms of the refusal to the effect that the testimony of Schempler is, on the whole, in favor of the plaintiff.

By the COURT: I did not mean to influence the judgment of any one. I only stated that as my reason for declining to make the charge.

By the COUNSEL OF DEFENDANT: I am afraid that it has done so.

By the COURT (to the jury): Anything I have said with

191 regard to any fact in the case should not be allowed to influence your judgment. The facts are for you to determine. Altho' it may be proper at times for the court to impart to the jury the impression made upon its mind by the testimony, they are not bound by it. I repeat that you must not be influenced by any expressions I have used in regard to any questions of fact whatever.

By DEFENDANT'S COUNSEL: We except, of course, to the refusal of the court to charge as we requested & to those parts of the charge which are inconsistent with these requests, but especially to that part of the charge in which *in* the court said that Dr. Smith & other witnesses had testified that Mr. Trefz was a very healthy man in 1872, & for a long time after, inasmuch as the question of his health after he became acquainted with Dr. Smith & the other witnesses referred to was not the question at issue at all, but the state of his health in 1867 & '8, & long before the policy.

192 BY THE COURT (to the jury): That exception is well taken, if I have so charged, & I will now do it. Whatever Dr. Smith or others may have said in regard to the condition of the insured's health after 1872 should not affect your judgment; but in this same connection you should also weigh the statement of Mrs. Trefz, that her husband was always a healthy man.

BY DEFENDANT'S COUNSEL: Another special point of exception concerns the charge in regard to Dr. Derby as agent of the company; & the effect of the fact, if it was true, that he had been informed by Schempler & Trefz, in regard to sunstroke, & said it was a matter of no consequence. By our taking exceptions in this way I presume it will be sufficient to cover the whole charge when we shall have it written out. On that subject, our claim, of course, is that Dr. Derby, as the physician of the company, could not interrupt the effect of the statement made

193 years before, or waive the right of the company arising out of it. And not only that, but this statement in 1871 could not abrogate the effect of a subsequont contract made in *in* 1873, based upon the truth of former statements in 1871.

By the COURT: I am afraid that counsel did not fully understand what I said to the jury on that point. What I attempted to say was this: that if it was true, as Schempler stated, that the insured revealed to the

company's examiner, in 1871 or 1872, the full extent of the sunstroke in 1866, & the company then thought that it was of so little consequence that it ought not to hinder the renewal of the policies, the jury have the right to infer that it was not of such consequence as to make the statement of the insured a fatal mistake.

By DEFENDANT'S COUNSEL: We except then to the charge in
194 these terms. I did understand it substantially as stated now. I think this point covers all the exceptions.

(The jury, after an absence of about one hour, returned into court with a verdict in favor of the plaintiff in the sum of $11,998.82.)

Mr. Coult, for the plaintiff.

Mr. Keasbey, for the def't.

A true copy.

[SEAL.] S. D. OLIPHANT, *Clerk*,
per H.

195 And thereupon the counsel for the defendant excepted to that part of the said charge in which the court instructed the jury that "in considering whether the reply 'never sick' in one of said declarations was an untruth of such a character as to avoid the policy, they ought to remember that the applicant was not a native born citizen and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him."

And to that part of the charge in which the court instructed the jury as follows:

"When this testimony was given I presume that every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the company regarded the attack when he was told of it as of too little consequence to hinder the renewal of the forfeited
196 policies, it was now too late for them to come forward and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words, that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it and take the money of the insured for a renewal of the policies, and after his death to avoid the payment of the loss on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply of 'never sick.'"

And the defendant also excepted to that part of the charge in which the court instructed the jury as follows:

"It is for you to determine the extent of the injury received by Mr. Trefz, and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not."

197 "It is for the jury to say from the evidence in regard to the extent, nature, and kind of sickness, whether the attack which the insured suffered was of the character to make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The company sets up the defence, and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

And the said exception to the charge were allowed and sealed accordingly.

JNO. T. NIXON, *J.* [SEAL.]

And thereupon the counsel for the defendant requested the court to charge the jury—

"That if within one or two years the insured had such disease (sunstroke), his answer 'Never sick' was untrue, although he had entirely recovered from it long before his death, or even at the time of his application."

198 And the court declined so to charge, saying, "I do not think it is true, as I have endeavored to state in my charge."

To which refusal to charge the defendant prayed an exception, and the same is sealed accordingly.

JNO. T. NIXON, *J.* [SEAL.]

And the *the* counsel for the defendant also requested the court to charge the jury as follows:

"That it is proved by witnesses, unimpeached and uncontradicted, that the insured frequently stated that he had had sunstroke in the summer of 1866, and guarded carefully against its reoccur'ance long after the insurance was effected, and that unless you can find something in the case which renders these statements incredible the jury are bound to treat the facts as established in the cause, and to find for the defendant on the principles asserted by the court."

But the court declined so to charge on the ground that it would

199 not interfere with questions of fact before the jury.

And thereupon the defendant prayed an exception to such refusal, and the same was allowed and sealed.

JNO. T. NIXON, *J.* [SEAL.]

And, thereupon, the defendant's counsel requested the court to charge the jury as follows:

"That if the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even although the answer may have been true in the sense in which he understood the question."

And the court declined so to charge, to which the defendant excepted, and such exception is sealed accordingly.

JNO. T. NIXON, *J.* [SEAL.]

200 *Copy of original application for policy of ten thousand dollars, referred to in the foregoing bill of exceptions.*

This applicant, Christina Trefz, of Elizabeth No. 73, of New York, proposes to insure the life of Christoph Trefz, who, at present, resides at No. 73 Elizabeth, who is (relationship) his wife, with the Knickerbocker Life Insurance Company to the amount of $10,000.

(Sixteen different questions and answers follow, of which the fifth sixth, and seventh are the only ones referred to in the bill of exceptions; these are as follows:)

5. Whether now or formerly, when and how long, and to what degree, subject to, or at all affected by, any of the following diseases and infirmities: Apoplexy, asthma, bilious affections, bronchitis, consumption, coughs, prolonged diseases of the brain, disease of the heart, disease of the lungs, disease of the stomach, disorder of the bowels, disorder

201 of the liver, disease of the bladder, disease of the kidneys, dropsy, diarrhœa, dissentary, dyspepsia, epilepsy, erysipelas, fistula, fits, gout, gravel, insanity, palpitation, palsy, piles, pleurisy, rheumatism, rupture, salt rheum, or any disease of the skin, scrofula, small pox, stone or gravel, sore throat, spitting of blood, spinal complaint, vertigo, yellow fever.—Never sick.

6. A.—Has the party been afflicted, during the last seven years, with any severe or constitutional disease? B.—If so, with what?—No.

7. Is the party now diseased? If so, with what?—No.

And do hereby agree that in the above proposal for assur-
202 ance, all the restrictions in the policy based on this application are binding on me, and shall be the basis and form part of the contract or policy between and the said company; and that if any fraudulent or untrue allegation, misrepresentation, or concealment as to my health or habits, be contained in this proposal, all moneys which shall or may be paid on account of such assurance or dividends due me shall be forfeited to the said company, and the policy be void.

And hereby declare that have an interest in the life of the said to the full amount of $

And it is further agreed that any insurance based on this application shall not be binding until the policy is actually delivered by the company, and the premium settled thereon. And the omission to pay at maturity any note given for premium upon the policy based on this application shall then and thereafter cause the policy to be void without notice to the insured or the insurer, or any party or parties interested therein. Also, in case of loss, all unpaid notes given, either by me or by others, for the premium or other indebtedness of the insurer
203 or insured, may be deducted from the sum insured; and where the payments made are less than the annual premium the balance of premium unpaid for the current year may be deducted.

Dated at New York this 18 day of March, 1868.

CHRISTINA TREFZ,
By CHRISTOPH TREFZ.

Witness:
R. C. BRUENINGHAUSEN.

204 *Copy of original application for policy of three thousand dollars referred to in the foregoing bill of exceptions.*

Fragen an Personen, die zur Lebens-Versicherung in dieser Gesellschaft vorgeschlagen sind.

1. A.—Name der person, zu deren Gunsten die Versicherung getten soll.
B.—Wohnung.
C.—Verwandtschaft zur næchst, genannten Person.
A.—Christina Trefz.
B.—73 Elizabeth Street.
C.—Frau.

2. A.—Name der Person, deren Leben versichert werden soll.
B.—Wohnort.
C.—Beschæftigung.
A.—Christoph Trefz.
B.—Daselbst.
C.—Malz und Hopfen Geschäft.

205 (Of twenty-two questions and answers following the two set forth above, the thirteenth, fourteenth, sixteenth and seventeenth are the only ones referred to in the bill of exceptions; these are as follows:)

13. Hat die zu versichernde Person gelitten oder leidet sie noch an einer Krankheit des Kopfes, des Herzens, des Magens, der Eingeweide, der Nieren, der Blase, der Geschlechts-Organe, oder an irgend einem Lebens Organ; und wenn dies, an welchem?—No.

14. Hat die Person je an den folgenden Krankheiten gelitten: Blutspeian, auszehrung, asthma, krebs, leberleiden, bronchitis, rheumatismus, bruch, fistelu, wassersucht, irrsinn, schlagfluss, gicht, krämpfe, hæmorrhoiden, kropf, scrophelu, oder ist sie jetzt taub, stumm oder
206 blind, und an welchen?—No.

15. A.—Hat der zu Versichernde während der letzten sieben Jahre an irgend einer ernsten oder constitutionellen Krankheit gelitten?

B.—Wenn dies, an welcher?—No.

17. A.—Hat die zu versichernde Person jetzt irgend eine Krankheit oder Unregelmæssigkeit?

B.—Wenn dies, welche?—No.

(The agreement attached is the same as in the application for policy of ten thousand dollars.)

Datirt zu New York den 25ten Mai 1867.

CHRISTINA TREFZ.

Zeugen:
G. MADERSTEIN.

207 Supreme Court of the United States.

THE KICKERBOCKER LIFE INSURANCE COMpany of New York, plaintiff in error,
vs.
CHRISTINA TREFZ, DEFENDANT IN ERROR.

Know all men by these presents that we, The Knickerbocker Life Insurance Company of New York, and James A. Hedden and William A. Thomas, of Newark, New Jersey, are held and firmly bound unto Christina Trefz, of the city of Newark, in the county of Essex, and State of New Jersey, in the sum of five hundred dollars, to be paid to the said Christina Trefz, her executors, or administrators; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and *one* and each of our successors, heirs, executors,
208 and administrators, firmly by these presents, sealed with our seals and dated the seventeenth day of November, eighteen hundred and seventy-seven.

Whereas the above named The Knickerbocker Life Insurance Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action in favor of the said Christina Trefz against the said The Knickerbocker Life Insurance Company by the circuit court of the United States for the district of New Jersey.

Now, therefore, the condition of this obligation is such that if the above named The Knickerbocker Life Insurance Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

I. A. NICHOLS, [SEAL.]
President Knickerbocker Life Ins. Co.

209 WILLIAM A. THOMAS. [SEAL.]
JAMES A. HEDDEN. [SEAL.]

Sealed and delivered in the presence of—
HENRY W. JOHNSON,
HORACE E. DEMING,
CHARLES T. GLEN,
Witnesses.

DISTRICT OF NEW JERSEY, *ss:*

James A. Hedden and William A. Thomas, of full age, being duly sworn, say that they are, each, worth over one thousand dollars over and above all their debts and liabilities.

JAMES A. HEDDEN.
WILLIAM A. THOMAS.

Sworn and subscribed this 17th day of November, A. D. 1877, before me.

[SEAL.] CHARLES T. GLEN,
A Notary Public of N. J.

(Endorsed:) Supreme Court of the United States. The Knickerbocker Life Insurance Co., pl't'ff in error, vs. Christina Trefz, def't in error. Security on writ of error & supersedeas. A. Q. Keasbey & Sons, Newark, N. J., att'ys. Approved. Jno. T. Nixon, J. Filed Nov. 20, 1877. S. D. Oliphant, clerk.

210 THE UNITED STATES OF AMERICA,
District of New Jersey, ss:

I, S. D. Oliphant, clerk of the circuit court of the United States, in and for the district of New Jersey, in the third circuit, do hereby certify that the foregoing writing, and hereto attached, to be true copies of the record and proceedings had in cause No. 23, of September term, 1876, of Christina Trefz, plaintiff, against The Knickerbocker Life Insurance Company, defendant, as fully as the same remain on file and of record in said cause in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said court at, Trenton, New Jersey, in said district, this ninth day of October, in the year of our Lord eighteen hundred and seventy-eight.

[SEAL.] S. D. OLIPHANT,
Clerk of said Court.

(Indorsement on cover:) No. 331. The Knickerbocker Life Insurance Company, plaintiff in error, vs. Christina Trefz. New Jersey C. C., U. S. Filed 9th November, 1878.

O

SUPREME COURT U.S.
FILED
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SUPREME COURT of the UNITED STATES.

No. 85.

THE KNICKERBOCKER LIFE INSURANCE CO.

Plaintiff in Error,

VERSUS

CHRISTINA TREFZ,

Defendant in Error.

Writ of Error from Circuit Court of the United States for the District of New Jersey.

BRIEF FOR PLAINTIFF IN ERROR.

A. Q. KEASBEY,
HENRY W. JOHNSON,
Of Counsel.

United States Supreme Court.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

CHRISTINA TREFZ,
Def't in Error.

In Error from U. S. Circuit Court for the District of New Jersey.

BRIEF FOR PLAINTIFF IN ERROR.

The action was brought on two policies of insurance issued to Christina Trefz, on the life of her husband, Christopher Trefz, September 3, 1873. One for $2,500 and the other for $8,500. On the 25th of May, 1867, the defendant in error applied to the company for, and obtained a policy on the life of her husband for $3,000.

In this application were contained various questions, among which were:

"Has the person to be insured either formerly or now suffered from any disease of the head (kopfes), the heart, the stomach, the bowels, the kidneys, the bladder or the sexual organs, or any of the vital organs."

"Has he, within the last seven years, suffered from any serious constitutional sickness."

To these the written answers, signed by the applicant, the defendant, were "No."

This application was in the German language. (Record, page 59–60, translation, page 47.)

On the 18th of March, 1868, the same parties applied for and obtained another policy of $10,000, and the application contained various questions, among which was:

"Whether the person to be insured, now or formerly, when and how long and to what degree subject to, *or at all affected by* any of the following diseases and infirmities: apoplexy, bilious affections, bronchitis, consumption, coughs prolonged, diseases of the brain," etc. (See question on page 58.)

To this the answer, signed Christina Trefz by Christopher Trefz, was, "Never sick."

This application was in the English language.

Both of these applications contained this agreement:

"That if any fraudulent or untrue allegation, misrepresentation or concealment as to my health or habits be contained in this proposal, all moneys which shall or may be paid on account of such assurance or divi-

dends due me shall be forfeited to the said company and the policy be void."

Upon the faith of these representations the two policies were issued, and were kept in force till March, 1871, when one of them—it is not shown which—lapsed for non-payment of premium. (Record, pages 22 and 35.)

Within a day or two the insured, with his clerk, Henry F. Schimper, went to the office to pay the premium and was referred to the doctor—E. W. Derby. Schimper says (page 23) that the doctor asked Trefz if he had had sunstroke, and Trefz said "Yes, he was sunstruck on the farm once; he had a farm and was at the farm taking in hay and was sunstruck."

That the doctor asked him if he had felt anything since, and he said "no;" and whether he was sick any time—taken sick by the heat again afterwards and he said "no;" and the doctor said, "that is all right," and gave him a certificate, and they paid the premium and continued the policy.

The doctor produced a memorandum, brought to him by the assured from the office, which he caused to be signed by the party and pinned to the examination—the original. He says he made an examination and wrote on the memorandum: "Has some hesitancy in his speech which he and a friend with him say is natural;" that nothing else could have been called to his mind or it would have been stated; that he gave him to understand that his health had always been good; that he had had no sickness that amounted to anything or else he would not have received the policy. (Record, pages 35 and 36.)

It must be observed that Schimper did not say that he told the doctor when the sunstroke occurred. The presumption would be that it was after the policies were issued, since he then said he had never been sick.

September 6, 1873, these two policies were exchanged for the two on which the suit is brought, both of which were issued in pursuance of agreements, dated August 30, 1872, signed by both husband and wife, in this form:

"The undersigned, owner of policy No. on the life of Christopher Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for , with insurance payable annually, and in consideration thereof I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made, and are hereby made the basis of the contract between myself and the said company for the new policy hereby solicited."

Christopher Trefz, the insured, died February 24, 1876, and his widow brought this suit. Upon the trial evidence was offered by the defendant to prove that in the summer of 1866—the summer preceding the first policy—the insured had a sunstroke in the hay field and was overcome by it for two days; that he carried a cabbage leaf in his hat to guard against a return; that he was in the habit of talking about it even after he came to Newark, in 1869; that he went to Sharon Springs soon after the sunstroke twice, for three or four weeks.

The evidence on this subject is found in the testimony of Schimper (page 16, &c.) and Mrs. Trefz (page 41, &c.)

There was no evidence to contradict this beyond the softening of the facts on the cross-examination of these unfriendly witnesses.

Upon these facts it was claimed by the defendant below that the answers in the original applications, on which the new policies were expressly based were proved to have been untrue, and therefore, by the express contract in writing of the plaintiff, the policies were void.

The questions before this Court arise wholly out of the charge of the Court as to matters relating to the above representations upon which the policies in question were issued.

The nature of these questions will appear in the Assignment of Errors.

ASSIGNMENT OF ERRORS.

The plaintiff assigns for error—

First That the Court erred in charging the jury as follows: "In considering whether the reply 'never sick' was an untruth of such a character as to avoid the policy the jury had the right and ought to remember that the applicant was not a native-born citizen, and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him."

Second. The Court erred in charging the jury in reference to the testimony relating to the transaction with the doctor in March, 1871, as to the renewal of one of the policies, as follows: "When this testimony was given I presume that every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the company regarded the attack when he was told of it as of too little consequence to hinder the renewal of the forfeited *policies*, it was now too late for them to come forward and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it and take the money of the insured for a renewal of the *policies*, and after his death to avoid the payment of the loss on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply 'never sick.'"

Third. The Court erred in charging the jury as follows: "It is for you to determine the extent of the injury received by Mr. Trefz, and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence in regard to the extent, nature and kind of sickness whether the attack which the insured suffered from was of a character to make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The company sets up the defense and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

Fourth. That the Court, upon request, erroneously refused to charge the jury as follows: "That if within one or two years the insured had such disease (sunstroke), his answer 'never sick' was untrue, although he had entirely recovered from it long before his death or even at the time of application."

Fifth. That the Court, upon request, erroneously refused to charge the jury as follows: "That it is proved by witnesses unimpeached and uncontradicted that the insured frequently stated that he had had sunstroke in the summer of 1866, and guarded carefully against its recurrence long after the insurance was effected, and that unless you can find something in the case which renders these statements incredible the jury are bound to treat the facts as established in the cause, and to find for the defendant on the principles asserted by the Court."

Sixth. That the Court, on request, erroneously refused to charge the jury as follows: "That if the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even although the answer may have been true in the sense in which he understood the question," but on the contrary charged the jury (Record, page 51) as follows: "It seems to me that in endeavoring to ascertain the truth or falsity of the answer we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses."

The exception on page 14 of the record as to premium receipts, and that on page 15 as to the burden of proof, are not insisted on.

ARGUMENT.

As to the first exception—

1. This exception relates only to the $8,500 policy, substituted in September, 1873, for the $10,000 policy issued Mar. 18, 1868.

The application for this policy and the questions and answers were written in English. The applicant for both the original and the substitute was *Christina* Trefz—not her husband.

Upon receiving the new one she agreed in writing—also in English—that all those answers were true, and that they were the basis of the new contract.

There is no proof whatever that the applicant, Christina Trefz, the original owner of the policy, who now sues upon it, was not a native citizen or was not fully acquainted with the English language.

Yet the Judge, confusing the applicant with the insured, charged in substance that in considering whether *her* answers concerning the health of her husband whose life she was trying to insure for her own benefit, were true or not, the jury were bound to remember that *he*, the subject of

the insurance was a foreigner and might not have understood the questions put to *her* and *her* answers concerning *hts* condition.

This was an obvious error, not only in a legal point of view as will hereafter be shown, but as a statement of fact which tended to mislead, and must have misled the jury, in treating the vital point of the case.

She made certain written answers to written questions, and contracted in writing that if they were not true the policy should be void.

She must be assumed to have understood these answers and the language in which they were given.

And yet the court instructs the jury that in considering whether *she* answered truly they must remember that *her husband* did not understand English and might have mistaken their meaning.

This instruction was not only wholly foreign to the matter in hand, but obviously tended to draw off the attention of the jury from the true issue, and to lead them to suppose that it was the husband whose truth was in question, and not the wife—the applicant and plaintiff, and the only person who ever had any beneficial interest in the matter. It was doubtless an inadvertence, but it was a most damaging one for the company, and they are entitled to have it corrected.

2. If this instruction had been true in fact as to the wife as the applicant, or had been confined in terms to the husband as acting for her, it would still have been erroneous in point of law.

Both husband and wife signed the agreement on which the policy was based, referring to the answers in the original application and making their truth the condition of the insurance. The contract was an express warranty that the answers were true. In the absence of any proof of fraud or imposition they must both be conclusively presumed to have understood the meaning of the agreement and the application.

To instruct the jury that because one of them imperfectly understood English, they might infer that he did not known what he was signing, was error.

It was immaterial whether he understood it or not. It was their agreement on the faith of which the wife procured the contract and they were both bound to inform themselves of its meaning.

To make such a suggestion as to any written contract is to destroy the force and effect of it, and to deprive the other party of all the protection for which it was designed.

Especially in insurance cases, it opens a ready door for the practical abrogation of the contract on the part of the insured, of which juries will eagerly avail themselves, as in this instance.

It is the law, definitely established by this court that if these answers were untrue they avoid the policy whether material to the risk or not:

Ætna vs. France, 91 U. S. 510.
Jeffries vs. Life Ins. Co., 22 Wall. 47.
Nat. Bank vs. Ins. Co., 95 U. S. 673.
Ins. Co. vs. Gridley, 100 U. S. 614.

The Judge in fact so charged the jury. But he destroyed the effect of that charge by the subsequent instruction to which the first exception applies.

It was as if he said, "This applicant Christina Trefz was bound to answer these questions truly, whether material or not. If she did not she cannot recover; but then you ought to remember that her husband was a foreigner and did not speak English well—you may infer that he did not understand it well,—if he did not, she, the applicant for the policy, and the real party to the contract may recover, notwithstanding her answers were untrue."

This was the real meaning of the instruction and it was plainly erroneous.

And it was fatal to the defendant, for it is plain from the evidence that the answer was untrue, and it must be presumed that the jury acted on the suggestion of the Judge and determined that the husband did not understand the question and answer—and that, therefore, under the ruling of the Judge, the applicant, his wife, ought to recover.

II.

As to the second exception—

This relates to the charge of the Judge concerning the transaction with the doctor.

The Judge substantially told the jury that if the statement of Schimper (wholly inconsistent with the doctor's statement and with his memorandum written at the time) was true the jury must come to the conclusion that it was too late for the company to say that the answer was sufficiently untrue to avoid the policies—*both policies.*

This instruction was open to several objections :

1. It was sweeping and related to both policies, whereas, the testimony as to the whole transaction had reference only to one policy. One policy only had lapsed and the attention of the doctor was called to but one. Whatever was said as to that one which led to its renewal, it could have no effect upon the other There was no question concerning that. It stood upon its own foundation and was then and always had been void, if the statements were untrue. No attempt was made to renew it upon any new submission to the doctor.

2. This transaction was in March, 1871, more than two years before the policies sued on were issued. However the facts then stated might have availed to confirm the single policy which was then dealt with, they can have no effect upon the new contracts afterwards made.

In August, 1873, these two old policies were in force. The applicant sought new ones. But for the former applications, new questions and answers would have been required.

If new and similar ones had been then made, would it avail to defeat their effect to prove that two years before—in dealing with a lapsed policy —the applicant had spoken of sunstroke and had been told by the doctor that it was all right ?

Plainly the new contract would have rested on the new statements, and if they had been untrue the policies would have been void.

But by consent and express written agreement, the old statements were

taken and substituted for new ones. The effect was precisely the same as if they had been then newly made. In fact the new agreement was that the old answers were true and valid *when made*—in 1867–8.

How then could it alter their effect that two years and a half before, such a conversation was held with the doctor as to another transaction? And as to a sunstroke which might have happened long after the answers were made, so far as the doctor was informed?

Yet the Judge in effect said that if, as Schimper said, Trefz told the doctor in 1871 that he had had sunstroke and yet succeeded in getting another policy renewed, his answer "never sick," in 1868 renewed on the basis of a new contract in 1873, must be held to be true, or not so untrue as to avoid this policy.

This was erroneous. It is manifest that if, in 1873, instead of adopting the old answer "never sick" it had been stated he had had sunstroke —that "he was working and fell down and did not know anything about himself any more," (page 25) as Schimper says he told the doctor in 1871, the new contract would not have been made.

In making these new contracts the use of the old applications by consent, instead of new ones, dispensed with the necessity of referring to the doctor, and made it impossible to take into view these alleged verbal statements made in 1871 as to a former transaction. And the company was not bound to take them into view, even if they were true, nor to inquire whether they referred to a period later than the old policies.

Moreover, if they were true and did refer to a former period the applicant was bound to repeat them in 1873 to the officer issuing the policy as he had, as Schimper says, to the doctor when the question was whether the former policy should lapse.

On the contrary no new examination was made, and no new statement required. "It rested on the original—there was no necessity."

(Dr. Derby's testimony, p. 35.)

It was the intention to take the life as it stood in 1867–8, and to rely on the statements then made as to the risk. It is obvious that statements as to a sunstroke which occurred after the policy was issued might be important as to whether a forfeiture should be waived and yet be utterly immaterial in reference to the exchange of the old policies for new ones.

3. This instruction was erroneous because of the definite manner in which it told the jury the view of the Court as to the conclusion they should come to as to the matter under consideration, and the inferences they should draw from Schimper's testimony if they thought it true.

III.

As to the third exception—

The substance of this is that it was for the jury to determine the extent of the injury, and whether it was of such a nature as to make his answer "never sick" untrue.

It is true that it is the law, as the Judge charged, that the burden is on the defendant to prove the untruth of the answer.

But the effect of this instruction is that when the defendant *has* proved

that the answer "never sick" was untrue for the reason that the insured was once sick with sunstroke—a serious disease of the brain—the jury may judge whether he was sick enough to make it untrue in a legal sense so as to avoid the policy. In other words, the Court left it to the jury to determine whether a *false* statement *warranted to be true* was material to the risk taken by the defendant.

This was erroneous, under the principles laid down by this Court in Ætna v. France, Ub. Sup.

Such instruction, as to the evidence concerning diseases always given by reluctant witnesses in these cases, must always afford a jury an easy escape from the operation of settled principles of law.

If applied to sunstroke it can as properly be applied to bronchitis, or rupture, or any other disease of brain or body.

The answer was more broad than the question required. It asserted—not only that he had never had any of the specified complaints—but had never been sick at all. It claimed an absolutely good risk and precluded minuter inquiry. The applicant is bound by it, and if it proves to be false it is error to permit the jury to judge from the softened explanasions of interested parties whether it is quite false enough to avoid the consequences stipulated by express contract.

IV.

As to the fourth exception—

This relates to the refusal of the Judge to instruct the jury that if the insured had had sunstroke (which was not denied) the answer was untrue, although he had recovered from it at the time of the application.

The Judge not only refused to give this instruction but added the reason, viz., "I do not think it is true as I have endeavored to state in my charge."

This means, and must have been understood by the jury to mean, that the Judge did not think that the answer was untrue if the assured had had sunstroke in the manner proved.

He thus stated to the jury his opinion on a point which he had already left to them, and withdrew it from their consideration.

If it was a question of fact for them, it was error thus to charge.

If it was a question of law for the court, then it was erroneous, because as matter of law the sunstroke as proved, with all subsequent facts concerning it—taken as they stand in the evidence on both sides—rendered the broad statement "never sick," untrue in a legal sense, and upon established principles avoided the policy.

V.

As to the fifth exception—

The request was to charge that since all the evidence showed that the insured had had sunstroke in 1866 and had guarded against its recurrence long after the policy, the jury were bound to find the policy void unless they could disbelieve the testimony.

The Judge refused on the ground that he would not interfere with questions of fact.

If the meaning of the Judge as to the last exception has not been misunderstood, he had already expressed his view that the facts did not show the answer untrue.

We claim that he erred in this, and that on the contrary he ought to have charged as requested in this exception.

If the evidence showed the answer untrue and was uncontradicted, the defendant, in an insurance case, being entitled to the fair operation of the principles which govern these contracts, can only receive it by such explicit direction from the Court.

It was necessary, in order to guard against such error as was found in the case of *Ætna vs. France.*

So far from giving such legal protection, the Court refused the request, and told the jury in effect, first, that they could judge whether the sunstroke proved was of such a nature as made the answer untrue; and second, that the Court itself did not think it was.

We submit that this was erroneous in both aspects, and practically deprived the defendant of the protection afforded by its express contract with the applicant respecting the life of the insured. It should be remembered that the question was whether the insured had been subject to *or at all affected by*, any of the diseases named.

VI.

As to the last exception—

It relates to the request to charge that if the answers were untrue in the sense in which the questions and answers are commonly understood, the policies were void, though true in the sense in which the insured and the applicant understood them.

The Judge not only refused this, but charged the exact reverse—saying that the jury should look at it in the light of the knowledge and understanding which the insured had of the terms.

This was erroneous. The questions and answers formed a part of a written contract between Christina Trefz and the company.

If there was a dispute as to their terms then they must be interpreted according to their ordinary signification. But there was no dispute. They were plain and explicit. They had an accepted meaning, of which the Court was bound to take judicial notice, and no proof was admissible to show how they were commonly understood.

Either party had a right to an instruction to the jury to that effect, and it ought not to have been refused. It was the only way to guard against a partial view of the case by the jury.

They could not be told to interpret them according to the understanding of either party if they did not agree. Much less could they properly be instructed to interpret them according to the probable understanding or knowledge of a *third* party.

But here the Court not only refused the instruction asked—the only means of arriving at a just result—but actually charged that the truth or falsity of answers must be looked at in the light of the knowledge and

understanding of the *insured*—the husband—who was not the contracting party. The application begins: "This applicant, Christina Trefz, proposes to insure the life of Christoph Trefz," &c., and the questions propounded and answered by *her* were concerning the party to be insured —not concerning herself.

The point of the matter is what the answers really meant as both contracting parties *ought* to have understood them—not how did she in fact understand them—and certainly not how did *he*—the *subject* of the contract—understand them.

And yet the Judge charged that *his* alleged ignorance of the language made it right for the jury to ignore the common accepted signification of the words, and even to disregard the views of *both* the parties to the contract, and to look at them—as to the very essence of the case their truth or falsity,—in the light of the understanding of the husband—who was merely the individual in whose life the applicant had an insurable interest —offered by her to be insured.

This was erroneous, and tended to mislead the jury and to confuse their minds as to the real questions to be determined.

For these errors the judgment should be reversed, and a new trial ordered.

A. Q. KEASBEY,

HENRY W. JOHNSON,

Of Counsel with Plaintiff in Error.

October 15, 1881.

Supreme Court of the United States.

No. ~~331.~~ 85

THE KNICKERBOCKER LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

CHRISTINA TREFZ,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

BRIEF OF JOSEPH COULT,

Of Counsel with CHRISTINA TREFZ, *Defendant in Error.*

NEWARK, N. J.:

PRESS OF WARD & TICHENOR, 832 AND 834 BROAD STREET.

1881.

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

United States Supreme Court.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, *Plaintiff,*

vs.

CHRISTINA TREFZ, *Defendant.*

In Error from the U. S. Circuit Court for the District of New Jersey.

Brief of JOSEPH COULT, for Defendant in Error.

STATEMENT.

The original applications contained these words:

"That in the above proposal for assurance all the restrictions in the policy, based on this application, are binding on me, and shall be the basis and form part of the contract or policy between and the said company, and that if any fraudulent or untrue allegation, misrepresentation or concealment as to my health or habits be contained in this proposal all moneys * * shall be forfeited * * and the policy be void."

Case, page 59, fol. 202.

The application for the new policy provides as follows:

"I hereby covenant and agree that all the statements contained in the original application and declaration for the said policy, were true and valid when made, and are hereby made the basis of the contract * * * * for the new policy."

Case, page 15.

The new policy provides as follows, (page 8, fol. 29):

"In consideration of the representations made to them in the application for this policy and upon the faith of which the same was issued, and of the premium," &c.

And in the conditions under which the policy shall be void, (*Case*, page 9, fol. 33,) the policy provides that the same shall be void.

"If any of the statements or declarations, made in or accompanying the application for this policy, and upon the faith of which the same is issued, shall be found in any respects untrue," &c.

Among the questions contained in the original applications were the following:

5. Whether now or formerly, when and how long and to what degree, subject to, or at all affected by any of the following diseases and infirmities, * * * diseases of the brain, * * * ? Never sick.

6. Has the party been afflicted during the last seven years with any severe constitutional disease—if so, with what? No.

7. Is the party now diseased—if so, with what? No.

The application in German contained the same questions in German; the answers in each instance were, No.

A Synopsis of the Exceptions taken.

1st Exception, page 14, is not sealed.

2d Exception,

Claims that plaintiff should prove affirmatively as conditions precedent the truth of the allegations made in the applications for old policies.

3d Exception. To the charge, p. 57:

Where Court says that the jury should take into account the fact that Trefz was a German and did not fully understand the question when he made his answer, "Never sick."

Also to the part of charge in which the Court stated that the action of the company, through its agent, in reinstating the policy, after being told by Trefz of the sunstroke, if so told, ought to estop the company from setting up that the sickness was of such a character as to avoid this policy now.

And, also, to that part of the charge in which it is stated that it is for the jury to say from the evidence, whether the attack was of such a character as to make the answer "never sick," a falsehood, and that the burden of proof is on the defendant.

4th Exception. To the refusal to charge, page 58:

That if within one or two years insured had sunstroke, answer "never sick" was untrue, although recovered from before death, or even before application.

5th Exception. To refusal to charge, page 58:

That it was proved by witnesses that deceased had stated that he had sunstroke in 1876, and the jury were bound to find for defendant on this ground, unless something in the case rendered the statements incredible.

6th Exception. To refusal to charge, page 58:

That if answer of Trefz was untrue in the sense in which the question and answer were commonly understood, the policy was void, though the answer was true in the sense in which he understood the question.

Argument.

I.

The first exception was taken to the ruling of the Court below, in holding that the production and proof of the receipts of the defendant corporations for the annual premiums, signed by its president and secretary, by the plaintiff, was *prima facie* evidence of the payment of the annual premiums.

We are not certain that this exception will be relied

on by the plaintiff in error. It does not appear to have been sealed in the bill of exceptions.

See *Record*, page 14, folio 55.

If, however, it should be, it is, we think, easily disposed of.

I. That receipts duly proved are *prima facie* evidence of the payment of money, is a rule of evidence so long and well established, and so constantly and universally recognized, that it seems unnecessary to cite the authorities. I refer only to

Greenleaf on Ev., 12th ed., vol. 1, p. 241, § 212.

Phillips on Ev., 5th ed., vol. 1, * p. 474.

II. By the pleadings as they stood, it was unnecessary for the plaintiff, in order to make out a *prima facie* case against the defendant, to offer proof of the payment of the premiums.

The payment of the annual premiums is indeed made a condition precedent by the policy, and generally its performance must have been pleaded specially and some proof given of its performance by the plaintiff.

By the act regulating the practice of law in the State of New Jersey, Revision, 1875, page 868, § 126, it is provided that:

"The plaintiff or defendant in any action may aver "performance of conditions precedent generally; and the "opposite party shall not deny such averment generally, "but shall specify in his pleading the condition prece- "dent, the performance of which he intends to contest."

This practice would regulate the pleadings and fix the order of the proofs in this cause.

Desty's Fed. Procedure, § 914.

The plaintiff does aver performance of all conditions precedent generally, in both counts of her declaration, and the defendant, with the general issue, pleads the breach only of one condition, that relating to death from the habitual use of intoxicating drinks. This, so far at least as plaintiff's case is concerned, limits the proof on her part to the production and proof of the execution

of the policy of insurance. The proof of the performance of conditions not specified in the plea of the defendant was unnecessary.

This regulation of the practice in New Jersey is salutary; it provides for a specification, by the defendant, of the real ground of his complaint, confines the proof to reasonable limits, facilitates the trial of causes and promotes the administration of justice.

II.

The second exception (the first sealed in the bill of exceptions) is to the ruling of the Court in refusing to require the plaintiff, as a part of her case before the same was submitted to the jury, to prove affirmatively the truth of the statements made in the declaration which preceded the execution of the original policy, for which the policies sued on were afterwards exchanged, on the ground that such declarations formed part of the contract sued on, and that the statements contained in them thereby became express warranties, and that the plaintiff was bound to prove their truth in the first instance as conditions precedent.

I. What we have just said in relation to the state of the pleadings in this cause, and the practice in the State of New Jersey, where it was tried, under the first exception, applies with equal force to this.

No condition, precedent or otherwise, contained in the declarations or other papers mentioned in the policies, or either of them, were specified by the defendant in its plea, and the defendant cannot be allowed now to insist upon

such proof, on the part of the plaintiff, and can only avail itself of such a defence, if it exists, under the general issue, on the ground that the truth of these statements having been affirmed in the contract sued on, their falsity shown on its part, by the terms of the agreement of the parties make it void.

II. The question as to the burden of proof in all this class of cases has been settled by this Court. The burden is on the defendant.

Piedmont, &c., Lf. Ins. Co. vs. *Ewing, admr.*, 2 Otto, 377.

III. We do not admit, but on the contrary deny that these declarations became parts of the contracts sued on in such manner as to make the statements contained in them express warranties.

These policies declare "that they are issued upon the faith of" and "in consideration of" the representations made in said applications, and also that if such statements shall be found in any respects untrue, then the policies shall be void.

These references to the declarations do not constitute them part of the contract strictly, their only effect is to enable the defendant to avoid the contract made, by showing that these statements, or some of them made outside the contract itself, are or were false.

If these declarations become in fact parts of the policies in the strict sense insisted on by the defendant, then it would have been the duty of the plaintiff to set them out in her declaration and prove them.

It could never have been the intention of the parties that these statements, some of which are included in the written proposals or declarations, and some of which were merely verbal, for the policies speak in the same connection of statements and declarations not only "made in" but "accompanying the application," should all be deemed and considered part of the policy contract, and that the plaintiff should, in order to make a claim, be required to set these out as a part of it.

These statements and declarations are evidently the verbal declarations of the assured made to the company

or its agents and the written proposal kept by the company or its agents, of the contents of which the assured has at best but little knowledge. The parties do contract that these statements shall be true, else the contract is at an end—void—but they lie outside of the contract, and their existence and falsity must be shown by the defendant in order to make it void.

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III.

The third exception is to certain matters contained in the charge of the Court, and includes three specifications: 20

1st. "That in considering whether the reply 'never "sick' was true or false, the jury could consider the fact "that the assured was not a native born citizen, was not "familiar with the language used, did not speak it with "fluency, and that it is fair to assume from the testimony "he did not understand it very fully."

It will not be insisted, I presume, that the Court misstated the testimony on this point. In the cross-examination of Mr. Schimper, *Record*, p. 25, line 93, in answer to the question, "Just state what Mr. Trefz said?" the 30 witness replied, "That is as near as I can give it, Mr. Keasbey. Mr. Trefz speaks very bad English, that was the reason the doctor asked me first off whether Mr. Trefz had sun-stroke, because he did not understand him well, so Trefz told he was overcome by the heat. He said that half English half German."

Dr. Derby, the company's medical examiner, says of the assured, whom he examined in March, 1871, for reinstatement after lapse by reason of non-payment of premium, (*Record*, p. 38, line 1,) *Q.* "He was a Ger- 40

man?" *A.* "Yes, sir." *Q.* "And expressed himself with difficulty?" *A.* "Yes, sir."

These references are sufficient to show that the Court was commenting upon the testimony and simply directed the attention of the jury to the facts. He stated that it was fair to deduce from that the inference that he did not fully understand our language when it was spoken to him. This follows as a consequence of his want of understanding.

The argument I presume will be that he is bound to know, and must be supposed to have known the force and effect of such question, and if the answer given is not true, then there is no contract.

It will be observed that the answer "never sick" is not responsive directly to the question. The question is, "have you ever had disease of the brain?" The direct categorical answer would have been "yes" or "no." The answer, "never sick," is evidently put down by the questioner as the result of Mr. Trefz's remarks. Now it may well be that he, Trefz, not being acquainted with our language, except imperfectly, did not get the force and effect of the question, and it may be that this answer was a correct and truthful answer to the question as Trefz understood it.

The jury are simply to take the fact that he was a German into consideration in determining the question. How could they do otherwise?

But the direction is not material, as we shall show the fact was that his answer "never sick," considered as a negative answer to the question put, was true; and the jury so found, as a question of fact.

2d. The second specification under this exception is to the statement of the Court of the effect (if true) of the testimony of Mr. Schimper, as to the conversation which took place at the time when Mr. Trefz was examined by Dr. Derby, for the purpose of restoring these policies when they had lapsed by reason of non-payment of the premiums in March, 1871.

In effect, the direction of the Court was that if they believed this statement as narrated by Mr. Schimper, it would operate as an estoppel.

The evidence of Mr. Schimper, as to what took place at that time, is found in his direct examination, at page 23 of the *Record*. It is in effect that at the time Mr. Trefz explained to the doctor all the circumstances connected with the so-called "sunstroke;" told him just how it affected him, and that Dr. Derby told him "That is all right," gave him a certificate of health, and that therefore his policies were reinstated by the company, and he continued to pay the premiums until his death.

This ruling of the Court is certainly correct. The company had no right to waive a forfeiture, reinstate the policies, renew the contracts upon the basis of a new examination, take the money of the assured, and then say to his beneficiary after his death, we will hold now that the statement which the assured made, in the original application, "never sick," was a falsehood which avoided the policy.

The company would not be allowed to continue to take the plaintiff's money for the renewal of the old contract, after having been fully informed of the facts connected with what is called the "sunstroke," and after-

[illegible] within the meaning of the policy. I also cite :

Higbee v Life Ins. Co. 53 N. Y. 603.
Newton v Life Ins. Co., 76 N. Y. 427.
Wilkinson v Life Ins. Co., 30 Iowa 118.
Ins. Co., v Francisco, 17 Wall. 672.
Ins. Co., v Wise, 34 Md. 582.

On the question of waiver and estoppel by the renewal I cite :

Huntley v Perry, 38 Barb. 569
Rathbone v Ins. Co., 31 Conn. 193.
Wetherell v Ins. Co., 49 Me. 200.
Walsh v Ins. Co., 30 Iowa 133.
Bliss on Lf. Ins. 2d Ed. § 272 p. 453.
Whited v Ins. Co., 76 N. Y. 402.

man?" *A.* "Yes, sir." *Q.* "And expressed himself with difficulty?" *A.* "Yes, sir."

These references are sufficient to show that the Court was commenting upon the testimony and simply directed the attention of the jury to the facts. He stated that it was fair to deduce from that the inference that he did not fully understand our language when it was spoken to him. This follows as a consequence of his want of understanding.

The argument I presume will be that he is bound to know, and must be supposed to have known the force and effect of such question, and if the answer given is not true, then there is no contract.

It will be observed that the answer "never sick" is not responsive directly to the question. The question is, "have you ever had disease of the brain?" The direct categorical answer would have been "yes" or "no." The answer, "never sick," is evidently put down by the questioner as the result of Mr. Trefz's remarks. Now it may well be that he, Trefz, not being acquainted with our language, except imperfectly, did not get the force and effect of the question, and it may be that this answer was a correct and truthful answer to the

In effect, the direction of the Court was that if they believed this statement as narrated by Mr. Schimper, it would operate as an estoppel.

The evidence of Mr. Schimper, as to what took place at that time, is found in his direct examination, at page 23 of the *Record*. It is in effect that at the time Mr. Trefz explained to the doctor all the circumstances connected with the so-called "sunstroke;" told him just how it affected him, and that Dr. Derby told him "That is all right," gave him a certificate of health, and that therefore his policies were reinstated by the company, and he continued to pay the premiums until his death.

This ruling of the Court is certainly correct. The company had no right to waive a forfeiture, reinstate the policies, renew the contracts upon the basis of a new examination, take the money of the assured, and then say to his beneficiary after his death, we will hold now that the statement which the assured made, in the original application, "never sick," was a falsehood which avoided the policy.

The company would not be allowed to continue to take the plaintiff's money for the renewal of the old contract, after having been fully informed of the facts connected with what is called the "sunstroke," and afterwards claim a forfeiture on that account. It would be held a waiver, and would work an estoppel.

3d. The third specification under this exception was to that part of the charge in which it is stated that it is for the jury to say from the evidence, whether the attack was of such a character as to make the answer "never sick" a falsehood, and that the burden of proof was upon the defendants.

Whether the facts proved in relation to the so-called "sun-stroke" showed that the assured had thereby been made sick, and that a disease of the brain was the result, was certainly a question of fact for the jury which the defendants were bound to make out affirmatively.

Pidemont Lf. Ins. Co. vs. *Ewing*, 2 Otto, 377.
Boos vs. *World Mu. Life Co.*, 64 N. Y., 236.

IV.

The fourth exception is covered by the last specification to the third exception. It was a demand that the Court should decide as *matter of law* that the "sunstroke" so-called, was such a sickness or disease of the brain as that it made the answer "never sick" avoid the policy.

V.

The fifth exception was a refusal by the Court to take the same question of fact from the jury, and to judge of the weight of the evidence and the credibility of of the witnesses.

It does not seem to me necessary to comment on this exception.

VI.

The sixth and last exception was to a refusal of the Court to charge the jury, that if the answer of Mr. Trefz was untrue in the sense in which the question and answer were commonly understood, the policy was void, though the answer was true in the sense in which he understood the question.

This request had no relevancy to the case. There was no evidence to show that any of the terms used either in the question or answer had any technical or special signification, or that the assured understood them or claimed to understand them in any such sense, it was, therefore, properly refused.

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REPLY TO ARGUMENT

IN BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

In reply to the suggestions made in the brief of the counsel for the plaintiff in error, permit me to say:

Counsel says the applicant was *Mrs. Trefz*, not her husband; the answers were, therefore, her answers, and the judge misled the jury in saying that they had a right to remember that the applicant was foreign born and unfamiliar with the language in which the question was put, in considering the question as to whether the reply "never sick" was an untruth of such a character as to avoid the policy.

If the learned judge was mistaken in this regard, it is quite clear he was misled by the counsel, who now, for the first time, complains of the mistake.

Among the numerous written requests made by him of the court are the following:

"9th. That if within one or two years the *insured* had such disease, *his* answer "never sick" was untrue, although *he* had entirely recovered from it long before *his* death, or even at the time of *his* application. P. 55, folio 195.

"13. If the answer of Trefz to any question was untrue in the sense in which such question was commonly understood, the policy is void, even though the answer may have been true in the sense in which *he* understood the question." P. 56, folio 190.

Again, at p. 28, folio 96, counsel in attempting to prevent the admission of what he deemed irrelevant testimony, stated the question at issue in the case in these words:

"We do not intend to offer any proof of that at all; [referring to the plea that the insured died from the habitual use of intoxicating drinks;] we insist that if this man stated

untruly that he was never sick, then the policy is void; *that is the issue in this case.*"

This objection is evidently based upon the discovery that the applications are in form made by the wife when the life of the husband is insured.

In point of fact, however, the answers are usually made by the insured, and were in this instance, as appears from the testimony of Dr. Derby, p. 38, fol. 135, and Mrs. Trefz, p. 46, fol. 154.

If, however, the answers made were substantially true, (as I claim the jury found, having the right thus to find,) it is quite immaterial who gave the answers, the applicant or the insured.

This question of fact, "were the answers true or untrue?" was fully and fairly submitted to the jury, pp. 50, 51, 52.

II.

Counsel also argues that the court made a mistake in commenting upon the fact of the reinstatement of a lapsed policy, referring to it in such manner as to lead the jury to infer that *both* policies had been revived.

If this was a mistake, counsel should have called attention to it; he took exception to this part of the charge, but not on this ground; his objection to it was, "that statements made to Dr. Derby in 1871 would not affect the former contracts made in 1867 and 1868, nor interfere with the right of the company to insist upon the renewal contracts of 1873, based upon the applications made in 1867 and 1868." (P. 56, folio 192, &c.)

In this connection I ought to call the attention of this court to the fact that the exception on this point does not include the explanation given by the judge of this part of his charge, which was accepted by the counsel as the charge of the court on this subject. (P. 56, fol. 193; p. 57, fol. 194.)

It could make no possible difference whether, at this time, both or only one of the policies had lapsed. The applications were the same in each case. This was admitted. P. 48, fol. 159.

In 1867 and 1868, these applications were made and the policies issued; in 1871, one was forfeited by non-payment of the premium; before it was reinstated the Company's Medical Examiner was fully informed of the so-called sunstroke and its effect. He declared that it was of no consequence, and the policy was revived, and the company continued to take the annual premiums on both policies to the day of his death In 1873, the policies were, at the request of the company, changed from "half note" to "all cash," and the change was made on the basis of the original applications.

Now, when the question arises whether this sickness, or sunstroke, was a disease of the brain, or of such a character as to make the answer "never sick" a false statement, and avoid the policies, the judge says the jury may take the conduct of the company and its agent into consideration in making up their verdict.

If the company, with full knowledge of the facts, told the insured that his sickness or accident did not amount to a disease of the brain and did not invalidate his contracts, and continued to take his money, it should not afterwards be allowed to take a different position. The judge did not charge, however, that it would work an estoppel, but allowed the jury to consider it as a circumstance in determining the question as whether in point of fact the answer "never sick" was untrue.

III.

A third complaint against the charge of the judge in this case, is that he expressed his opinion that the answer never sick was not untrue.

As he very clearly left this question to the jury, the counsel is evidently in error.

The seventh, eighth, and ninth requests to charge (p. 55, fols. 187 and 188) must be read together, in order to understand what the judge did say.

In the eighth request counsel asks the judge to charge "that by the undisputed medical evidence of the plaintiff's witnesses sunstroke is a disease of the brain;" and by the ninth request "that if within one or two years the insured had *such disease*, his answer never sick was untrue."

The reply to this request was: "I decline to charge that, because I do not think it true, as I have endeavored to state in my charge."

Now, what did he state he did not think true? This: "That by the undisputed medical testimony sunstroke is a disease of the brain." He had just stated, in declining the eighth request, that he did not so understand the testimony of Dr. O'Gorman, and he referred to what he had stated in his charge. (p. 53, folios 180, 181.)

The judge expressly refused to withdraw this question from the jury, although he was requested so to do by the defendant, and his refusal is the principal ground of error assigned.

Although the judge did not express his opinion on the question of fact, he might have done so without error, if he did not withdraw it entirely from the jury.

Fireman's Ins. Co. *v.* Walden, 12 John., 513.

IV.

Exception is also taken to the refusal of the judge to charge—

"That if the answer of Trefz to any question was untrue in the sense in which such question and answer are

commonly understood, the policy is void, even though the answer may have been true in the sense in which he understood the question."

The reply of the judge to this request was:

"That will hardly do, and I decline to charge it."

The learned counsel has insisted, in the argument, that the answers contained in the applications were made by the applicant, Mrs. Trefz, and not by the insured, her husband. If this position is correct, then he could not ask the judge to charge that the answers were made by Mr. Trefz, as by this request he does.

There is nothing in the case upon which to base a request of this character. The question was as to the answer "never sick." This is not the usual reply. Trefz was shown to have a very imperfect understanding and command of the English language. The court charged the jury that this fact should be remembered in settling the question of truth or falsity, in understanding the answer. The explanation given by the judge in the charge at p. 55, fol. 180 and 181, covers the whole matter. There was no conflict in the testimony as to whether the words used had a limited or special signification.

The question was practically, "Have you had disease of the brain?" The answer was "never sick." The jury was instructed that in considering whether this reply was true or false, they could remember that the insured was a German, and had an imperfect understanding of the language in which the question was put; that they might for this reason be warranted in construing the answer to be "*never sick of a disease of the brain.*"

This was fair and unobjectionable.

V.

The main question in the case is raised by the exception taken to the request made that the court should direct a verdict for the defendant on the grounds—

1st. That the testimony established the fact that the insured had suffered from sunstroke prior to the making of the original applications, and that this was uncontradicted.

2d. That sunstroke was a disease of the brain, and therefore the answer "never sick" was false and the policies void.

The burden of proof being upon the defendant, the first proposition was not conclusively shown. That Mr. Trefz had suffered from the effect of the heat in 1866 may be admitted, but whether he really had a sunstroke may be doubted. The attack, whatever it was, was very slight, passed off quickly, almost immediately, and left no apparent effects.

See testimony of—

Mr. Schimpes, pp. 16, 17, 18.
Mrs. Trefz, p. 41.
Dr. O'Gorman, pp. 28, 30.
Dr. Smith, p. 33.
Dr. Derby, p. 37, fols. 124, 125.

The same testimony, taken in connection with the fact, abundantly shown, that the insured was a strong, healthy, active man, and died of a disease not induced by or the effect of the so-called sunstroke, not only rendered the second proposition doubtful, but clearly established the fact that if the insured had suffered from a sunstroke, the sunstroke did not cause a disease of the brain.

Both these questions were properly submitted to the jury.

The Life Ins. Co. *v.* Francisco, 17 Wall., 672.
Boos *v.* World Mutual Life, 64 N. Y., 236.
Fitch *v.* American Popular Life, 59 N. Y., 557.
Mutual Benefit Life Ins. Co. *v.* Wise, 34 Md., 582.

The case of *Ætna Insurance Co.* v. *France*, 91 *U. S.* 510, is not, as counsel supposes, an authority to the contrary. That case holds simply that when the parties have made the truth of answers to questions in the application material, and contracted that they shall be true, otherwise the policy shall be void; *that the question of materiality* cannot be submitted to the determination of the jury.

JOS. COULT.

14-209

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~339.~~ 93

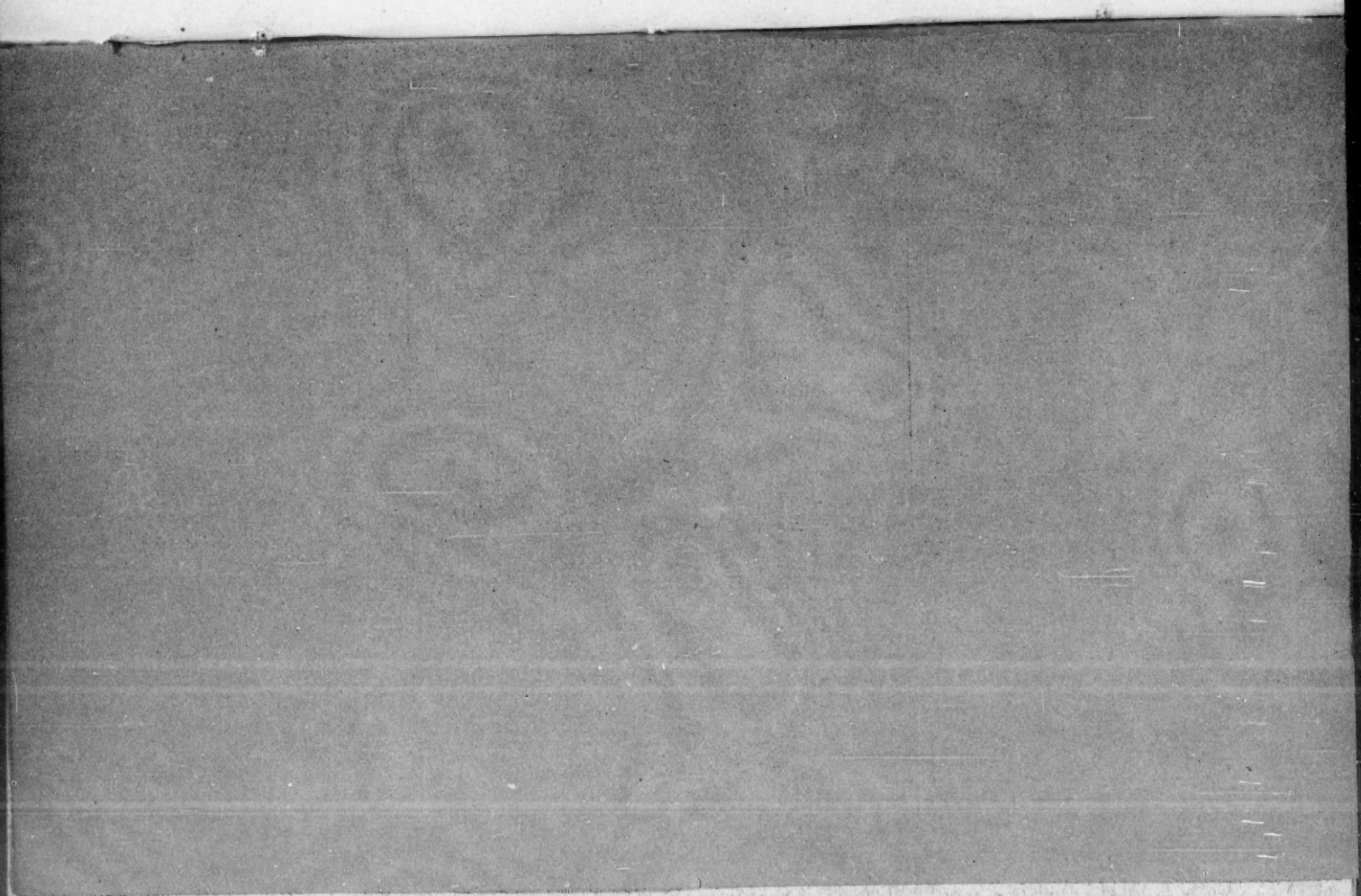
SAMUEL P. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE TOWNSHIP OF NOTTAWA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED NOVEMBER 18, 1878.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Samuel P. Williams, plaintiff, and the Township of Nottawa, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Samuel P. Williams, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Western District of Michigan,
By A. B. CARRIN, *Deputy.*

Allowed by—

S. L. WITHEY,
Dist. Judge.

(Indorsed:) The Supreme Court of the United States. Samuel P. Williams, pl'ff in error, vs. The Township of Nottawa, def't in error. Writ of error.

2 Supreme Court of the United States.

SAMUEL P. WILLIAMS, PLAINTIFF IN ERROR,
vs.
THE TOWNSHIP OF NOTTAWA, DEFENDANT IN error.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

John B. Shipman, of Coldwater, in said district, being duly sworn, says that he served personally on Charles Upson, one of the members of the law firm of Upson and Thompson, who were attorneys for the defendant in error in the court below, a true copy of the annexed citation, with a notice thereon endorsed that the same was a true copy of the annexed citation, on the 10th day of May, A. D. 1878, at the city of Coldwater, in said district, and at the same time exhibited to him said original citation.

JNO. B. SHIPMAN.

Subscribed & sworn before me May 10, 1878.

J. G. PARKHURST,
U. S. Com'r E. D. of Mich.

(Indorsed:) Supreme Court of the Unitad States. Samuel P. Williams, plaintiff in error, vs. The Township of Nottawa, defendant in error. Affidavit of service of copy of citation, &c. Hughes, O'Brien & Smiley, attorneys for pl'ff in error.

3 Supreme Court of the United States.

SAMUEL P. WILLIAMS, PLAINTIFF IN ERROR,
vs.
THE TOWNSHIP OF NOTTAWA, DEFENDANT IN error.

UNITED STATES OF AMERICA, *ss:*

To the Township of Nottawa, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein Samuel P. Williams is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable S. L. Withey, district judge of the western district of Michigan, this 8th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

S. L. WITHEY,
Dist. Judge.

(Indorsed:) Supreme Court of the United States. Samuel P. Williams, plaintiff in error, vs. The Township of Nottawa, def't in error. Citation. Hughes, O'Brien & Smiley, att'ys for pl'ff in error.

4 The Supreme Court of the United States.

SAMUEL P. WILLIAMS, PLAINTIFF IN ERROR,
vs.
THE TOWNSHIP OF NOTTAWA, DEFENDANT IN ERROR.

Know all men by these presents that we, W. R. Shelby, of the city of Grand Rapids, county of Kent, and State of Michigan, and W. O. Hughart, of the city of Grand Rapids, county of Kent, and State of Michigan, are firmly bound unto the Township of Nottawa in the sum of three hundred dollars, to be paid to said Township of Nottawa, or its legal representatives; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 13th day of May, A. D. 1878.

Whereas Samuel P. Williams has prosecuted a writ of error to the Supreme Court to reverse the judgment rendered in the above-entitled action in the circuit court of the United States for the sixth circuit and western district of Michigan, on the, to wit, the eighth

5

day of June, A. D. 1876, for the sum of, to wit, nine hundred and ninety-four dollars and fifty-seven cents:

Now, therefore, the condition of this obligation is such that if the above named Samuel P. Williams shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W. R. SHELBY. [SEAL.]
W. O. HUGHART. [SEAL.]

Approved.

S. L. WITHEY,
Dist. Judge.

(Indorsed:) The Supreme Court of the United States. Samuel P. Williams, plaintiff in error, vs. The Township of Nottawa, defendant in error. Security for costs. Filed May 14, '78. C. B. Hinsdill, clerk. Hughes, O'Brien & Smiley, attorneys for pl't'ff in error.

6 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

The circuit court of the United States for the western district of Michigan.

Samuel P. Williams, of Lima, and a citizen of the State of Indiana, plaintiff herein, by Henry H. Riley, his attorney, complains of the Township of Nottawa, a body corporate and politic, in the county of St. Joseph, in the western district of Michigan, created by and existing under the laws of the State of Michigan, and a citizen of said State, defendant herein, that it render to the said plaintiff the sum of forty thousand dollars of lawful money of the United States which it owes to and unjustly detains from him, filing this declaration as commencement of suit.

For that whereas, heretofore, to wit, on the 5th day of February, A. D. 1864, the people of the State of Michigan, by their legislature, did enact and pass an act to authorize the several townships in any of the counties on the line of the Grand Rapids and Indiana Railroad, to aid in the construction of said railroad.

7 And whereas, on the day and year last aforesaid, the said township of Nottawa was a township in St. Joseph County, on the line of said railroad, and also the Grand Rapids and Indiana Railroad, was a corporation created by and existing under the laws of the State of Michigan, having for its object the construction of said railroad from the village of Sturgis to the village Kalamazoo, in said State of Michigan. And whereas, afterwards, to wit, on or about the 25th day of July, A. D. 1866, a written request, bearing date, to wit, the day and year last aforesaid, signed by fifteen freeholders of said township of Nottawa, was presented to the then clerk thereof to call a meeting of the electors of said township for the purpose therein mentioned, to wit, of voting on and determining the question whether said township of Nottawa should raise a certain sum of money, to wit, the sum of fifteen thousand dollars, to aid in the construction of said railroad, and also whether such sum should be raised by issuing the bonds of said township of certain denominations in said request specified, with interest thereon at the rate of seven per cent. per annum, payable annually, said interest to be represented by coupons attached to each of said bonds, said bonds and

coupons to become payable at stated times and to be executed
8 according to the requirements of said act and deposited with the treasurer of said township, to be by him held until delivered up on proper authority, or to his successor in office.

And whereas afterwards, and on or about said 25th day of July, A. D. 1866, acting under and in pursuance of said act and said request, the said township clerk did call a meeting of the electors of said township of Nottawa, to be held on or about, to wit, the 11th day of August, A. D. 1866, and more than fifteen days after the date of said call, in the said township, at a place in the said call designated, and did also cause notices of the same to be posted, according to law, at least fifteen days before the day appointed for said special meeting, and did at the same time post with each of said notices a copy of the request upon which said meeting was called, and did also cause a copy of said request and notice to be published at least five days before such special meeting in a newspaper of general circulation in said township, published therein.

And whereas afterwards, to wit, on the day appointed by said clerk for said special meeting, a meeting of the electors of said township
9 of Nottawa was duly held at the place designated in said call and notices, and the questions then and there submitted to the said electors were those contained in the call for the meeting aforesaid, and said meeting was conducted in the same manner as annual meetings are conducted, and it was then and there determined by said electors to aid in the construction of said railroad in manner, form, and amount as was set forth in said request, each of the questions so submitted to said electors being determined in the affirmative, which result was duly certified by the board of inspectors of election of said township and filed in the office of the clerk thereof, in accordance with the provisions of said act.

And whereas afterwards, to wit, on or before the 17th day of January, A. D. 1867, the township board of said township of Nottawa directed the supervisor and clerk thereof to execute the bonds of said township to the amount of, to wit, fifteen thousand dollars.

10 And whereas the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain writing obligatory (numbered 47), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 48), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or

bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 49), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

11 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 50), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 51), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 52), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid,

acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

12 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 53), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 54), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 55), executed by its supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

13 And whereas, also, the said defendant afterwards, to wit, on

the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 56), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 57), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last afosesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 58), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

14 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 59), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said town of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said

treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 60), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 61), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

15 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 62), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 63), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars

the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 64), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

16 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 65), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 66), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 67), executed by its said supervisor and clerk, under their respective hands, and to the court now

treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 60), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 61), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

15 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 62), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 63), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars

the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 64), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

16 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 65), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 66), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 67), executed by its said supervisor and clerk, under their respective hands, and to the court now

here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bonds, as the same should become due.

17 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 68), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 69), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 70), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

18 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 71), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And WHEREAS, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 72), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 73), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

19 And whereas, also, the said defendant, afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 74), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate

of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 75), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 76), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars, the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond,

20 as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 77), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 78), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indeb ed to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded

to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 79), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

21 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 80), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain otherwriting obligatory (numbered 81), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 82), executed by its said

supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

22 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 83), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 84), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 85), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal

sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

23 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 86), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1868, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum shall be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 16), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 17), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

24 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 18), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel

Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 19), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 20), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

25 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 21), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 22), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid,

acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 23), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

26 And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 24), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 25), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 26), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

27 And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 27), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 28), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 29), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of

seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

28 And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 30), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 31), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 32), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

29 And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 33), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum

above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 34), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas also the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 35), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

30 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 36), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 37), executed by its said

supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 38), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

31 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 39), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 40), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be

fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 41), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

32 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 42), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 43), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 44), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or

bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

33 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 45), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 46), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 87), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of two hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of two hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

34 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 88), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year

last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of two hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of two hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 89), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of two hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of two hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

35

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 90), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of two hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of two hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

36

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 91), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of two hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of two hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1869, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

37

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 7), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum shall be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 8), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 9), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendants afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 10), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 18 , with interest thereon at the rate of seven

per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on
41 the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 11), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 12), executed by its said supervisor and clerk, under their respective hands, and to the
42 court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 13), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in
43 the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 14), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline or bearer in the sum of one hundred dollars, other parcel of the sum above demanded to be

paid to the said plaintiff, which said sum of one hundred dollars
44 the said defendant thereby agreed to pay to the said Samuel Kline or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 15), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one hundred dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one hundred dollars the said defendant agreed to pay to the said Samuel Kline, or bearer at the office of the treasurer of said township of Nottawa, on the
45 first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 4,) executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one thousand dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should
46 be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 5), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one thousand dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond as the same should become due.

47 And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 6), execu-

ted by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one thousand dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1870, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa, aforesaid, by its certain other writing obligatory (numbered 1), executed by its
48 said supervisor and clerk, under respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one thousand dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1871, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 2), executed by its said supervisor and clerk under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer,
49 in the sum of one thousand dollars, other parcel of the sum above demanded to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1871, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of January, A. D. 1867, at the township of Nottawa aforesaid, by its certain other writing obligatory (numbered 3), executed by its said supervisor and clerk, under their respective hands, and to the court now here shown, the date whereof is the same day and year last aforesaid, acknowledged itself to be indebted to Samuel Kline, or bearer, in the sum of one thousand dollars, residue of the sum above demanded
50 to be paid to the said plaintiff, which said sum of one thousand dollars the said defendant thereby agreed to pay to the said Samuel Kline, or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, A. D. 1871, with interest thereon at the rate of seven per cent. per annum, payable at the office of said treasurer, on the first day of January of each year, until said principal sum should be fully paid, on presentation and surrender of the coupons annexed to said bond, as the same should become due.

51 The sum of which bonds so issued did not exceed ten per centum of the assessed valuation of the property of said township at the time of issuing said bonds; and the amount of said bonds which were made to become due in any one year did not exceed two per centum of the assessed valuation of said township at the time of issuing the same.

And the said plaintiff further avers that said bonds had attached thereto the requisite and necessary coupons as and for the interest thereon.

And said plaintiff further avers that said bonds and coupons were afterwards, to wit, on the day and year last aforesaid, duly deposited with the treasurer of said township of Nottawa.

And said plaintiff further avers that afterwards, to wit, on the day and year last aforesaid, the said Grand Rapids and Indiana Railroad was duly completed to the extent required by the terms of said act and of said vote as a matter precedent to the delivery of said bonds to said company or its order; and that thereupon, to wit, on the day and year last aforesaid, the treasurer of said township was duly author-

52 ized by proper authority to, and did, deliver up said bonds and coupons to said railroad company, and the same were by said railroad company sold.

And the said plaintiff further avers that he is and for a long space of time, to wit, for more than one year last passed, has been the lawful owner and bearer of the said bonds hereinbefore mentioned, and of the coupons attached to said bonds, to wit, thirty-one coupons for seven dollars each, attached to thirty-one of said bonds, numbered from 16 to 46 inclusive, and due January 1st, A. D. 1868.

Also five other coupons for fourteen dollars each, attached to five other of said bonds, numbered from 87 to 91 inclusive, and due January 1st, A. D. 1868.

Also nine other coupons, for seven dollars each, attached to nine other of said bonds, numbered from 7 to 15 inclusive, and due January 1st, A. D. 1868.

Also six other coupons, for seventy dollars each, attached to six other of said bonds numbered from 1 to 6 inclusive, and due January 1st, A. D. 1868.

Also nine other coupons, for seven dollars each, attached to said nine bonds, numbered from 7 to 15 inclusive, and due January 1st, A. D. 1869.

Also six other coupons, for seventy dollars each, attached to

53 said six bonds numbered from 1 to 6 inclusive, and due January 1st, A. D. 1869.

And also three other coupons, for seventy dollars each, attached to said three bonds numbered 1, 2, & 3, and due January 1st, A. D. 1870.

Which said several sums of money, in the said several counties mentioned, amount together to the said sum of forty thousand dollars above demanded.

And the said plaintiff avers that payment of the said several bonds and coupons has been duly demanded at the office of the treasurer of said township of Nottawa.

Whereby and by reason of the said sum of money being and remaining wholly unpaid, an action has accrued to the said plaintiff to demand and have of and from the said defendant the said sum of forty thousand dollars above demanded.

Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of forty thousand dollars above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to the damage of

the said plaintiff of forty thousand dollars, and therefore he brings his suit, &c.

54 HENRY H. RILEY,
Attorney for Plaintiff.

SEVERENS, BOUDEMAN & TURNER,
Of Counsel.

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I hereby certify and return that on the 5th day of September, A. D. 1874, I served on John C. McKercher, supervisor of the township of Nottawa, the within named defendant, by delivering to him a true copy of the within narr., at Nottawa, in said district, together with a copy of the notice endorsed thereon as is hereon endorsed.

JAMES HENRY,
U. S. Marshal.
WILLIAM J. HENRY,
Deputy.

Service, $2.00; copy, $ .50; travel, 80 miles, $4.80—$7.30.

(Indorsed:) Circuit court of the United States for the western district of Michigan. Samuel P. Williams vs. Township of Nottawa.

Narr.

To the within named defendant:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules kept by the clerk of said court, in his office in the city of Grand Rapids, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule or judgment, etc.

Yours, etc.,
Dated September 1, A. D. 1874.

H. H. RILEY,
Attorney for Pl'ff.

Filed Sept. 1st, 1874.

ISAAC H. PARRISH,
Clerk.

55 In the circuit court of the United States for the western district of Michigan.

SAMUEL P. WILLIAMS }
vs.
TOWNSHIP OF NOTTAWA. }

On filing declaration as commencement of suit, and on motion of H. H. Riley, attorney for the plaintiff, ordered that the defendant plead thereto within twenty days after service thereof, together with notice of this rule, or judgment, &c.

H. H. RILEY,
Pl'ff's Att'y.

The circuit court of the United States for the western district of Michigan.

THE TOWNSHIP OF NOTTAWA }
ads.
SAMUEL P. WILLIAMS. }

To the clerk of said court:

SIR: We are retained and appear as attorneys for the defendant in the above entitled cause, and you will enter appearance and file the accompanying plea and notice, &c., of defendant in said cause.

Dated Sept. 22, 1874.

UPSON & THOMPSON,
Def't's Att'ys.

56 The circuit court of the United States for the western district of Michigan.

THE TOWNSHIP OF NOTTAWA }
ads.
SAMUEL P. WILLIAMS. }

And the said defendant, the township of Nottawa, by Upson & Thompson, its attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

UPSON & THOMPSON,
Def't's Att'ys.

To the above plaintiff and to H. H. Riley, his attorney:

Take notice, that on the trial of the above cause the defendant will offer in evidence and insist in its defense, amongst other things, that said bonds or writings obligatory, numbered from 1 to 91, inclusive, and the coupons belonging with the same, being the writings obligatory and coupons referred to in plaintiff's declaration and declared upon in this suit, were each and all of them executed and delivered without any authority from said township of Nottawa for the execution and delivery thereof, and contrary to the provisions of the statutes of the State
57 of Michigan, and in disregard of the vote of the taxable property-holding electors of the said township of Nottawa, and that neither the said electors nor said township ever by any vote or otherwise authorized the execution and delivery of said bonds and coupons to the said Samuel Kline or any other person, and that no certificates of stock of the Grand Rapids and Indiana Railroad Company or any other securities were ever given or delivered by said Grand Rapids and Indiana Railroad Company or any one to said township of Nottawa, or given to or delivered or deposited with the treasurer of said township or with the treasurer of St. Joseph County as security or in consideration for said bonds and coupons, and that at the time said bonds and coupons were executed and delivered the ties had not been furnished on the line of the road bed of the said Grand Rapids and Indiana Railroad Company, nor had the road-bed thereof, including all bridges, culverts, cattle-guards, and road crossings, been fully completed, nor were they ready for the iron within the limits of the said township of Nottawa.

That the execution and delivery of said bonds and coupons was procured by fraud and misrepresentation on the part of the said
58 Samuel Kline, acting in concert with one William Conner and his son, Mark W. Conner, and other persons interested and partici-

pating with them at the time for the purpose of obtaining said bonds and coupons for their own private gain; that said Kline and William Conner and their associates, in order to procure the issuing of said bonds and coupons, well knowing that Cornelius D. Bennett was then a member of the township board of said township and residing there, and was opposed to the issuing of said bonds and coupons, and that one Samuel Chipman was not a member of said township board when said Bennett was competent and ready to act, but that said Chipman was in favor of issuing said bonds and coupons, fraudulently procured and employed the said Chipman to attend and act as a member of said board at the time said bonds and coupons were issued, and intentionally omitted to notify the said Bennett of the time and place when the members of *of* said board were to be called upon to act in regard to the issuing of said bonds and coupons, but concealed that fact from him, and said Chipman did thereupon unlawfully assume to attend and act as a member of said board in regard to the matter of issuing said bonds and coupons and in favor thereof, and was paid by said Kline and Conner $100 therefor.

59 Also, that at the election in said township, when it is claimed in plaintiff's declaration that the issuing of said bonds and coupons was authorized by a majority vote of the taxable property holding electors thereof, and which was declared so carried by a majority of seven votes only, a large number, to wit, twenty persons, voted with said majority in favor of the proposition submitted, who were not taxable property holding electors of said township and were not competent to vote at said election, and whose votes if rejected or not counted would have changed the result of said election and have given a majority against the proposition then submitted to the said electors for their decision, and many of the electors of said township had claimed that said vote was illegal in consequence of the reception of said illegal vote, and had threatened to institute legal proceedings to prevent by injunction the township authorities from issuing any of said bonds and coupons; and the said Kline and Connor, well knowing all the foregoing facts, but desiring, for their own private gain and advantage, to procure the issuing and to obtain possession of said bonds and coupons before they could legally be issued & before any legal proceedings

60 should be instituted to prevent the issuing of the same, designedly and fraudulently procured and employed as aforesaid the said Samuel Chipman to assume to act, and to act as aforesaid, as one of the township board of said township of Nottawa to aid in procuring the issuing of said bonds and coupons to themselves and paid him therefor, and by means of the acting of said Chipman as one of said board in their favor by their procurement as aforesaid, and by falsely and fraudulently representing to the supervisor and township clerk of said township that they, the said Kline and Conner, if said bonds and coupons were executed and delivered to them, would not put them in circulation, but would hold them until some future action of said township should be had approving of their issue, and that they only wished to get said bonds and coupons issued before any injunction could be served upon the township to prohibit their issue, prevailed upon said supervisor and clerk unlawfully to assume to formally execute said bonds and coupons and to deliver them to said Kline and Conner, to be held as

61 aforesaid until some *festive* action of the township should approve of the issuing of the same, the said Kline & Conner giving them and said Chipman a bond to indemnify them against their illegal act in issuing the same; but since that time no such action has been had by said township, and said Kline & Conner, without waiting for any

such action on the part of the township, at once illegally and fraudulently assumed to treat said bonds and coupons as their own, and to put them in circulation; that at the time said bonds and coupons were so issued, the said Mark W. Conner was well aware of all the foregoing facts in regard to them and their issue, and soon became the owner and holder of a large portion of the same with that knowledge, and acted with said Kline and Wm. Conner in procuring them to be unlawfully issued as aforesaid, and that all, or nearly all, of said bonds and coupons are still held and owned by the said Samuel Kline, William Conner, and Mark W. Conner, or some one or more of them, or were so held and owned by them at the times when they by their terms respectively fell due; that the said plaintiff received said bonds and coupons with full knowledge of all the foregoing facts and circumstances, and
62 of all the facts and circumstances of fraud and illegality under which they were executed and delivered; that he is not a bona-fide holder of the same for a valuable consideration paid on the purchase thereof, and that he did not purchase or receive the same before their maturity and ignorance of the facts and circumstances aforesaid under which they were issued, and is not the real holder and owner thereof, and that this suit is prosecuted for the benefit and on behalf of the said Samuel Kline, Wm. Conner, and Mark W. Conner, and their confederates in procuring the issue of said bonds and coupons.

UPSON & THOMPSON,
Def't's Att'ys.

63 The circuit court of the United States for the western district of Michigan.

THE TOWNSHIP OF NOTTAWA }
ads. }
SAMUEL P. WILLIAMS. }

STATE OF MICHIGAN,
St. Joseph County, ss:

John C. McKercher, of Nottawa, in said county of St. Joseph, being duly sworn, deposes and says that he is the supervisor of the township of Nottawa, the defendant in the above-entitled cause, and is its agent in attending to the defense of said suit, and in its behalf makes this affidavit; and this deponent further says that as said supervisor and *and* as the agent for said defendant he has made diligent search and inquiry into the facts and circumstances connected with the execution and delivery of the bonds or writings obligatory and the coupons connected with the same declared upon and referred to by the plaintiff in his declaration in this suit, to wit, the said writings obligatory referred to in said declaration as severally numbered from 1 to 91 inclusive, and the coupons connected therewith, and as having been executed by
64 said township defendant by its supervisor and clerk to Samuel Kline, or bearer, in the aggregate for the sum of fifteen thousand dollars, and this deponent is informed and believes that the persons purporting to have executed and delivered said bonds and coupons never were authorized to execute or deliver the same by or on behalf of said township at the time they were so executed and delivered and that said bonds and coupons and each and every of them were executed and delivered by such persons without any lawful authority therefor from said township, and in disregard of the vote of the taxable property-holding electors thereof, and this deponent, on behalf of said defendant, denies that said defendant ever executed and delivered the said bonds

or writings obligatory and coupons or any of them, or ever authorized the execution and delivery thereof.

JOHN C. McKERCHER.

Sworn to and subscribed before me this 14th day of September, A. D. 1874.

[L. S.] CHARLES J. BEERSTICHER,
U. S. Commissioner in and for the Western District of Michigan.

UPSON & THOMPSON,
Def't's Att'ys.

Plea, notice, and affidavit. Filed Sept. 21st, 1874.
ISAAC H. PARRISH, *Clerk.*

65 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 6 day of June, in the year of our Lord one thousand eight hundred and seventy-six and of the Independence of the United States of America the one hundredth. Present, the honorable Solomon L. Withey, district judge. Among the proceedings then and there had were the fol'owing, to wit:

SAMUEL P. WILLIAMS
vs.
THE TOWNSHIP OF NOTTAWA.

This cause having been called for trial, the following jury was called and sworn, to wit: Joseph Bennett, Lyman T. King, George H. Brooks, R. E. Matthews, Horton Crandall, Thaddeus L. Waters, George C. Nelson, John Hamlin, Walker O. Smith, John Vogal, Robert Thompson, and B. M. Stowe, who sat together in the jury box and heard the evidence this day adduced.

66 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 7 day of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth. Present, the honorable Solomon L. Withey, district judge. Among the proceedings then and there had were the fol'owing, to wit:

SAMUEL P. WILLIAMS
vs.
THE TOWNSHIP OF NOTTAWA.

The jury heretofore empanneled in this cause sat together in the jury box and heard the evidence this day adduced.

67 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of

Grand Rapids, on the 8 day of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth. Present, the honorable Solomon L. Withey, district judge. Among the proceedings then and there had were the following, to wit:

SAMUEL P. WILLIAMS
vs.
THE TOWNSHIP OF NOTTAWA.

The jury heretofore empanneled in this cause sat together in the jury box and heard the evidence this day adduced, and after hearing the arguments of counsel and the charge of the court, retired in charge of an officer of the court sworn to attend them, and after being absent for a time came into court and say upon their oaths that the said defendant did undertake and promise in manner and form as alleged in the declaration, and assess the damages of the plaintiff at the sum of nine hundred ninety-four dollars and fifty-seven cents ($994.57) over and above his costs and charges.

It is therefore considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed as aforesaid, together with his costs and charges to be taxed, and that he have execution thereof.

68 UNITED STATES OF AMERICA.

The circuit court of the United States for the western district of Michigan.

At a session of the said court, held at the court-room in Grand Rapids, the 6th day of June, A. D. 1876, before the Hon. Solomon L. Withey, district judge.

The issue joined in the above entitled cause came on to be tried, and the parties appeared by their respective counsel; the jury was thereupon duly impanneled and sworn to try the said issue.

And thereupon the plaintiff, to maintain the said issue on his part, introduced witnesses who gave evidence tending to prove that at the spring election in 1866, in the township of Nottawa, John Rutherford was elected supervisor and Paul James Eaton was elected clerk of said township, and that through the year following, and until April, 1867, they acted as such supervisor and clerk respectively; the plaintiff, further to maintain the issue on his part, produced certain bonds purporting to be bonds of the township of Nottawa, and signed by said John Rutherford, supervisor, and Paul James Eaton, clerk. The bonds
69 were numbered from one (1) to ninety-one (91), inclusive; the said bonds bore date January 17th, 1867, and were for various amounts from one hundred dollars ($100) to one thousand dollars ($1,000) each, and were all in the same form substantially, except as to the numbers, amount, and time when they became due. And thereupon the plaintiff gave evidence showing that the signatures of John Rutherford as supervisor and Paul James Eaton as clerk of the said township were genuine signatures and in the handwriting of the said Rutherford and Eaton, respectively.

The following is a copy of one of said bonds, and shows the general form of them all:

$100.] STATE OF MICHIGAN. [No. 16.

Nottawa Township bonds, seven per centum interest, payable annually.

Know all men by these presents that the township of Nottawa, in the county of St. Joseph, and State of Michigan, acknowledges itself indebted to Samual Kline, or bearer, in the sum of one hundred dollars, lawful money of the United States, for so much money used in the construction of the Grand Rapids and Indiana Railroad from the village of Sturgis to the village of Kalamazoo, in said State, which sum of money the said township of Nottawa promises to pay to Samuel Cline,
70 or bearer, at the office of the treasurer of said township of Nottawa, on the first day of January, in the year one thousand eight hundred and seventy, with interest thereon at the rate of seven per centum per annum, which interest shall be paid at the office of said treasurer of said township of Nottawa on the first day of January each year until said principal sum is fully paid, on presentation and surrender of the annexed coupons as the same shall become due. The faith of said township of Nottawa is hereby solemnly and irrevocably pledged to make regular and punctual payments of the interest and principal when due.

In testimony whereof the supervisor and clerk of said township, by direction of the township board of said township, have signed and executed this bond in the township of Nottawa, county of St. Joseph, and State of Michigan, the 17th day of January, in the year one thousand eight hundred and sixty-seven.

(Signed) JOHN RUTHERFORD,
Supervisor.
PAUL JAMES EATON, *Clerk.*

The following are the coupons annexed:

$7. No. 2.

The township of Nottawa, in the county of St. Joseph, and State of Michigan, will pay the holder hereof, on the first day of January,
71 A. D. 1869, at the office of the treasurer of said township, seven dollars interest due that day on its bond No. 16.

JOHN RUTHERFORD,
Supervisor.
PAUL JAMES EATON,
Clerk, 1869.

$7. 1.

The township of Nottawa, in the county of St. Joseph, and State of Michigan, will pay the holder hereof, on the first day of January, A. D. 1868, at the office of the treasurer of said township, seven dollars, interest due that day on its bond No. 16.

JOHN RUTHERFORD,
Supervisor.
PAUL JAMES EATON,
Clerk, 1868.

And thereupon the plaintiff offered said bonds with the coupons originally issued with each bond in evidence; and thereupon the defendant's counsel objected to the introduction of said bonds in evidence

for the reason, first, that it did not yet appear from any evidence that there was authority in the persons whose names are subscribed to said bonds to execute them in behalf of the township so as to bind the township by their action giving such bond. That there is nothing yet shown of any vote of the township of Nottawa authorizing the issuing of any such bonds. That there are no recitals on such bonds showing they were issued by virtue of any act of the legislature of the State of Mich-
72 igan by virtue of any vote of the township of Nottawa. Second The declaration of the plaintiff sets up an act of the legislature of the State of Michigan under which it is claimed the said bonds were issued, and avers a written request of fifteen freeholders of said township to the clerk thereof to call a meeting of the electors to vote on certain propositions in relation to granting aid to the Grand Rapids and Indiana Railroad Company to the amount of fifteen thousand dollars, and that in pursuance thereof a meeting was called and held in said township on the 11th of August, 1866, and the proposition was voted, and there is no proof of any such averment.

The declaration further avers before Jan'y 17, 1867, the township board directed the supervisor and clerk to execute bonds of the township to the amount of fifteen thousand dollars, and there is no proof of any such averment. The execution of these bonds is denied under oath, and under the pleadings this evidence must first be introduced on the part of the plaintiff before the bond can be received in evidence; that independent of some express statute and of some vote of a township there can be no authority whatever in a township to issue bonds of this kind to bind the township, and they are not receivable in evidence under the plaintiff's declaration without that proof.

73 And further the declaration avers the road-bed, cattle yards, culverts, and bridges were ready for the iron prior to the issuing of the bonds, and there is no proof in support of that averment; and it being averred and put in issue under the pleadings, it is insisted that it is a condition precedent to offering the bonds in evidence.

It is further objected that these bonds on their face purport to be issued for so much money used in the construction of the Grand Rapids and Indiana Railroad from the village of Sturgis to the village of Kalamazoo, and there is no authority under the statutes of this State granting power to townships to vote aid for any such purpose; that is, to pay debts of the company already accrued.

The court thereupon sustained the objection made by the defendant's counsel, and stated as his opinion that the plaintiff must first give some evidence to show that the bonds were issued under the direction and by the authority of the township board; to which ruling and decision of the said court counsel for the plaintiff then and there excepted.

Thereupon plaintiff called as a witness one Charles A. Gregory, who testified that he was clerk of said township of Nottawa, and he thereupon produced and proved the record of said township.

74 And the plaintiff thereupon offered in evidence the said record on pages 169 and 170, which said record was in the words and figures following:

SPECIAL MEETING OF THE TOWN BOARD.

Present, John Rutherford, Samuel Chipman, Samuel W. Platt and P. Eaton.

JANUARY 17, A. D. 1867.

The township board present as above, resolve to issue Nottawa Town-

ship bonds for the sum of fifteen thousand dollars in accordance with the following schedule:

Three bonds of one thousand dollars each, payable in four years with use, numbered from 1 to 3 inclusive.

Three $1,000 bonds payable in three years, numbered from 4 to 6 inclusive, with use.

Three bonds of $100 each, payable in ten years, numbered from 7 to 16 inclusive, with use.

Thirty bonds of $100 each, payable in two years, due January first, 1869, numbered from 17 to 46 inclusive, with use.

Forty bonds $100 each, payable in one year, due January first, 1868, numbered from 47 to 86 inclusive, with use.

Five bonds of $200 each, payable in two years, due January first, 1869, numbered from 87 to 91 inclusive, with use.

And that the said board, for the security of the township and of the township board, do further resolve that they require the personal bond of Samuel Cline and William Connor in the sum of twenty thousand dollars ($20,000) with condition thereunto attached, which said
75 bond has this day been delivered and is on file.

(Signed) JOHN RUTHERFORD,
S. CHIPMAN,
P. EATON,
Township Board.

And thereupon the said record was received in evidence and read to the jury.

And thereupon the said plaintiff again offered the said bonds and coupons in evidence, and they were thereupon received in evidence and read to the jury.

And the counsel for the plaintiff, further to maintain the issue on behalf of said plaintiff, called John Rutherford, who, being sworn, testified, amongst other things, that he was supervisor of the township of Nottawa during the year 1866 and 1867, at the time the said bonds were issued, and that his genuine signature appeared upon the said bonds, and that the said bonds offered in evidence were the same bonds which were issued in pursuance of the record of said township offered in evidence.

Upon cross-examination the said Rutherford testified that when he signed the said bond Mr. Eaton, the township clerk, was present, and he thought that Samuel Platt and Samuel Chipman were also present; that he thought also William Connor was present, and that Samuel Kline and Mark Connor might have been present part of the time. And that they were signed in the justice office in the village of Centre-
76 ville, in said township of Nottawa, in the evening between eight and eleven o'clock, and that he thought Mr. Eaton was there all the while.

Thereupon the plaintiff rested his case.

Thereupon the defendant, to maintain and prove the issue upon its part, called as a witness the plaintiff Samuel P. Williams, who testified that he resided at Lima, Indiana; that his business was banking, loaning money and collecting debt; and that before commencement of this suit the bonds in question was in his possession; that he owned three of said bonds of $100 each since 1867, and three more of $100 each since 1869 or '70; that the last three named were assigned for collection by Bracey Tobey; that the first three were number 81, 82, and 83, and the three which he received from Tobey were number 80, 85, and 86; that

he received the balance of said bond' from Samuel Kline or William Connor for collection in the spring of 1874. I see Mr. Kline & Mr. Conner here now in the court-room. I received these bonds from Kline and Connor solely for the purpose of collecting them with mine. I don't claim to be the owner of them.

The defendant further called as a witness the said Paul James Eaton,
who testified, amongst other things, that he was township clerk of
77 Nottawa in January, 1867, and signed the bonds offered in evi-
dence; that he signed them in the evening of the 17th of January, 1867, between 9 and 11 o'clock, and that they had before that time been signed by John Rutherford, supervisor, and were all filled up ready for the witness to sign.

The witnesses attention was then called to the township record before offered in evidence, and he was asked to state when that record was made up, who was present, where it was made, and the circumstances under which it was made.

To which plaintiff's counsel then and there objected on the ground that it was irrelevant and immaterial; that his statement tended to explain and contradicted the record, and that it was incompetent so to do. The counsel for the defendant then stated that he proposed to show who got these men together, what was done, when they got together; that in fact nothing was done by them as a board, and that one of the men who acted as a member of the board was not a member of the board; that Mr. Kline and Mr. Connor both knew it.

Thereupon the court overruled the said plaintiff's objection, and permitted said witness to answer, to which ruling and decision of the said court the plaintiff by his counsel then and there excepted.

The witness in answer to said question testified: I was the
78 only member of the board there, as I understood it. Mr. Ruther-
ford was not there; Samuel Chipman was there, Mr. William Connor was there, and Mark Connor came in after I had signed the papers. I did not see Mr. Samuel Kline there; I do not think he was there at all. Samuel Platt was not there while I was there. I had not been there during the day. During the day I had been trying a case in the court. I had met Mr. Chipman and Mr. Connor at room No. 4, in the hotel in the morning, when he had talked over and discussed the question of issuing these bonds. I made the record which has been offered in evidence.

The defendant then offered the record of the township of Nottawa, for the avowed purpose of showing that Samuel Chipman, who acted as justice of the peace of said meeting of the township board, the record of which was offered in evidence, was not the oldest justice of the peace in the township at that time, and was not consequently a member of said township board: but one C. D. Bennett was such oldest justice of the peace, and therefore entitled to act as a member of the township board.

The plaintiff's counsel objected to this evidence upon the ground
79 that it was immaterial and irrelevant; that it was enough if
Chipman assumed to act as such senior justice of the peace, and was a justice of the peace of the township.

This objection was overruled by the court.

To which ruling and decision the plaintiff's counsel then and there excepted; and thereupon the records tending to show the facts aforesaid were received in evidence and read to the jury.

The witness Eaton was asked whether, while he was present on the occasion when the bonds were signed, any vote was taken or resolution passed by the township board; to which the plaintiff's counsel objected

on the ground that it was immaterial; that the record was the best evidence; that parole evidence was inadmissible to attack and dispute the record collateraliy; which objection was overruled by the court by remarking, "I am disposed to admit this evidence, but am not prepared to decide that simply because there was not a formal vote taken, that that affects this record"; to said ruling and decision the plaintiff, by his counsel, then and there excepted.

Thereupon the said witness testified, in answer to said question, that no vote was taken or resolution passed by the board while he was there.

The witness further testified as follows: "When I went there,
80 no board was present; nothing was done except that I signed the bond. Mr. Samuel Chipman was present a portion of the time, and Mr. William Connor was there all the time, and Mark Connor a short time at the close of the business. I drew up the record the next morning on information derived the day before from Samuel Chipman by a written note. At that time William Connor and Samuel Kline both lived in that township. As fast as I signed the bonds, Mr. Connor reached out his hand and took the bond and brought it up to him and placed one above another; and when I was done signing them, they were all in his hand or under his hand, on the table. I had nothing further to do with them. The last I saw of them Mr. Connor had them in his hands. Before I had signed any of the bonds, Mr. Connor said to me that when I had signed the bonds he would take the bonds one by one and pile them up, and when he got them piled up he would take them home and they should there remain until something further was done about them by the board. He said that the object of having them executed at that particular time was because that other parties who were working along on the line were getting orders from members of the corporation and demanding these bonds, and that we were
81 all neighbors, Mr. Kline and himself, and it would protect us, in a measure, to have those bonds where I could say they had been signed. Mr. Connor said that if we do not favor them in that kind of a way that somebody would get out a mandamus, and these bonds would get into the hands of persons who ought not to have them. He said if I would sign them and let him have them he would take them home and put them in a chest and keep them there. Connor had two propositions: To keep them until the further action of the board; and the other was, until he was entitled to them by having completed the work on the road. I told Connor that Chipman could not act on the township board; that he was not a member of the township board; but Connor said that he had got advice the other way, in which he could place confidence. I told Connor I did not think he was entitled to the bonds. He did not fulfill conditions of the vote. I told him in the evening and morning both. I further told him I did not regard them as entitled to the bonds by reason of the lack of fulfillment of the conditions of the vote; that the bonds would be illegal, in my judgment; that they were not worth the paper they were written on. Mr. Connor, in
82 reply, told me that he had received advice that he had confidence in; that he had talked with other persons about it, and he thought Mr. Chipman could act, and that he was confident of the validity of the bonds; that I was pretty young to set up opinion against him and Mr. Chipman. In regard to stamps, my recollection is that I made the proposition to him that the bonds should remain unstamped, and he consented they should remain unstamped in the box until the further action of the board. I remained township clerk until April, 1867. I know of no further action of the township board relative to the

bonds after that time. We received no money whatever for the bonds. We received no stock from the railroad company."

Thereupon the witness was asked the following question: Do you know of any stock or securities being passed over to the treasurer or the hands of the board?

This was objected to as irrelevant and immaterial by the plaintiff's counsel. The said objection was overruled by the court; to which ruling plaintiff's counsel then and there excepted.

The witness answered that none were passed over to the treasurer to his knowledge.

On cross-examination the witness stated that he was a practising lawyer; that the first member of the board he saw on
83 January 17th, 1867, was Rutherford, about five o'clock in the morning, in room number four in the hotel. That Samuel Chipman was also there, and Chipman asked him to go there and hold consultation about issuing these bonds. That he saw Chipman again that morning on the street before he went to the court-house; they talked in reference to issuing bonds. That he was not certain whether he saw Rutherford again during that day, but in the evening he was called in to execute these bonds. That they remained in the room in the hotel about half an hour in consultation about issuing the bonds; that he thinks William Connor was there; and another man from Indiana was also in town on the errand of getting bonds, and Connor stated to witness during a portion of the conversation that somebody would gobble these bonds up. Rutherford had agreed with me we would not execute the bonds; Chipman's note to me was that the board concluded in my absence that afternoon to issue the bonds. I said to Chipman, "You are not a member of the board. Which members of the board came to this conclusion?" He said, "Mr. Platt and Mr. Rutherford." I wrote out the resolutions and signed the proceedings, because I was as-
84 sured by Mr. Chipman at that time that the board had made the resolution, and I found also that Mr. Rutherford's signature was upon the bonds. I know from Connor—from what he told me and from rumour—that Kline and Connor were working on the railroad in the township prior to issuing the bonds. Connor claimed to me that evening that he and Kline had done work for the railroad, and that was the reason they claimed the right to the bonds on the road, and he said that the object of getting the bonds was because they were afraid that somebody else would get them and they would not. I never saw Mr. Connor produce any orders to the board that evening for the bonds. I never saw any orders. When Mr. Connor told me he would take these bonds and put them in his chest, I made this suggestion to him: "If we sign these bonds and you take them away, you can go and negotiate them, and thus perform a trick on us and get the bonds in circulation." And he said, "Mr. Eaton, I assure you that these bonds shall be piled up just in the order in which you sign them, and go into my chest, and I will take them right home and put them there, and they shall remain there until some further action is had concerning them by the
85 board." I said to him, "Mr. Connor, the work of putting in cattle-guards, and the reduction of that grade at the Skellinger Hill, and a large amount of other work along the line of the road in the township, has not been done, and I understand the statute to read, 'The company has not any power to demand these bonds, and they will not be legal.'" And he said he had had better advice about that.

The defendant, further to maintain the issue on its part, called one Samuel W. Platt, who gave evidence, amongst other things, tending to

prove that he was not present at the meeting when the proceedings offered in evidence was had.

Which testimony was in due time objected to by plaintiff's counsel on the ground that it tended to contradict the record by parole, which was incompetent in this proceeding. The said objection was overruled by the court, who said that defendant's counsel proposed to carry knowledge of that fact home to the parties in interest in this case. To which ruling and decision the plaintiff, by his counsel, then and there excepted.

Said witness further gave evidence tending to prove he was called by Connor to go to the hotel on the morning of the 17th of January, as
Connor claimed, to attend a meeting of the township board; that
86 he went there and stayed until noon of that day, while Chipman
and Rutherford were talking about issuing the bonds; that when he went in, Mr. Rutherford, Mr. Chipman, William Connor, and Mark W. Connor were present, and he thinks Samuel Kline was present, but is not positive. That in the afternoon they went to Chipman's office and had a talk upon the subject with Rutherford and Chipman, and stayed there during the afternoon. I remember Connor was at the hotel part of the time, but he was not positive of seeing Samuel Kline there.

The defendant further gave evidence tending to prove that William Connor and Samuel Kline both resided in the township of Nottawa in 1866 and 1867; that they were farmers, and had been residing there for many years.

The defendant, further to maintain the issue on his part, recalled the witness John Rutherford, who gave evidence tending to show he attached his signature to the bonds at his house on the day before the 17th of January, 1867. That the blanks were brought to him by William Connor; that the next day he took them to the village of Centreville, and in the evening of that day they were signed by the clerk. Witness
went to a funeral in the afternoon of that day, and returned and
87 was there in the evening at the time they were signed by the
clerk. That at the time the bonds were issued he received a paper from William Connor and Samuel Kline, which he individually has had in his possession ever since.

And thereupon the defendant's counsel, after proving the paper to be in the handwriting of Kline and Connor, and executed by them, offered the said paper in evidence.

And thereupon the plaintiff's counsel objected to the admission of said paper in evidence upon the ground it is irrelevant and immaterial. But the said court overruled the said objection, to which ruling and decision the counsel for the plaintiff then and there excepted. And thereupon the said paper was read in evidence to the jury, and is in the words and figures following:

Know all men by these presents that we, Sam'l Kline and William Connor, of Nottawa, St. Joseph County, and State of Michigan, are held and firmly bound unto John Rutherford, supervisor, and Paul James Eaton, township clerk, Samuel W. Platt and Samuel Chipman, justices of the peace, and are held and firmly bound unto said persons as individuals and as the township board, in and for the township of
Nottawa, St. Joseph County, State aforesaid, and to their succes-
88 sors in office, in the penal sum of twenty thousand dollars, lawful
money of the United States, to be paid to the said John Rutherford, Paul James Eaton, Samuel W. Platt, and Samuel Chipman, as said township board, or their successors in office, or as individuals, their

executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated this seventeenth day of January, A. D. one thousand eight hundred and sixty seven. In presence of, &c.

The condition of the above obligation is such that whereas the above bounden Sam'l Kline and William Connor have this day received in money bonds from the township of Nottawa by the township board of said township the sum of fifteen thousand dollars, said bonds issued for the purpose of aiding in the construction of the Grand Rapids and Indiana Railroad through the township of Nottawa; and whereas the said railroad is not yet finished in accordance with the provisions of the statute, the said Sam'l Kline and William Connor are to complete said
89 railroad through said township of Nottawa by the first day of August next, in accordance with the provisions of the statute.

And we hereby further agree, in consideration of said township board having issued the said fifteen thousand dollars of township bonds to us, that we will see said township harmless through the action of said board as such, or as individuals, that we will protect said board and township and individuals from any suit or suits they may be subject to by reason of issuing said bonds, then the above obligation to be void; otherwise to remain in full force and virtue.

SAMUEL KLINE. [L. S.]
WM. CONNOR. [L. S.]

Sealed and delivered in presence of—
M. W. CONNOR.

[Five 5-cent stamps canceled.]

And said witness further stated that the paper was delivered to him by Kline and Connor at the time of the delivery of the bonds to them.

Upon cross-examination, the witness stated that after attending the funeral in the afternoon on the 17th day of January, he returned in the evening to Centreville to see about issuing the bonds; that he there met Mr. Eaton, town clerk, and Eaton signed and delivered the
90 bonds in his presence to Mr. Connor; that when he testified first on this trial it was his opinion that he signed the bonds at the clerk's office in Centreville; but that he was mistaken, and that he now remembers that William Connor came to his house, and that he there signed the bonds on the 16th of January, and that he has a pretty clear recollection and is positive now on that subject, and that after signing the bonds at his house he hands them to William Connor, and that he had no recollection of seeing any order at any time in the hands of Kline and Connor, or either of them, upon which the bonds were fully issued.

The defendant, further to maintain the issue on its part, introduced in evidence the record of a township meeting held in the township of Nottawa, on the 11th day of August, 1866, upon the subject of issuing bonds to aid the Grand Rapids and Indiana Railroad Company, which record read as follows:

SPECIAL TOWNSHIP MEETING.

STATE OF MICHIGAN,
St. Joseph County, ss:

On this day of August, A. D. 1866, there was filed in this

office with the township clerk of Nottawa Township a peti-
91 tion addressed to the township clerk, and signed by twelve or more freeholders of the township of Nottawa, which petition is now on file in this office, requesting the said township clerk to call a special township meeting of the taxable property-holding electors of the said township to be holden on the day of August, A. D. 1866, at the court-house hall, in the village of Centerville, in said county, to determine by a vote of said electors whether or not the township shall raise one thousand dollars to aid the Grand Rapids and Indiana Railroad Company, also to take into consideration the propriety of issuing bonds for the fourteen thousand dollars voted by the freeholders and property-holding electors in said township, on the 26th day of August, A. D. 1864, the former vote limiting the time of issuing said bonds till the Grand Rapids and Indiana Railroad should be completed from Sturgis to Kalamazoo, and ready for the cars to run on said railroad; but instead of issuing said bonds at the time fixed by said vote to issue them whenever the ties shall be furnished and delivered on the line of the road, and the road bed thereof, including all bridges, culverts, cattle guards, and road crossings shall be fully completed in said township of Nottawa, and ready for the iron, said
92 fourteen or fifteen thousand dollars to be raised by tax on the general list of said township. And if bonds are issued they shall draw seven per cent. per annum, said bond to be drawn payable as follows, viz: Four thousand dollars payable one year from the date thereof; four thousand dollars payable three years from the date thereof, and the remainder payable in four years from the date thereof. Said request being dated the 17th day of July, A. D. 1866, and filed with the township clerk the 25th day of July, A. D. 1866.

July 25.—And I, the said township clerk, on the said 25th day of July, A. D. 1866, pursuant to said request, posted in three public places in said township notices calling a special township meeting of the taxable property-holding electors of said township, to be holden on the 11th day of August, A. D. 1866, according to law and according to said request.

(On the margin:) P. Eaton, town clerk.

Aug. 11, '66.—A meeting was held in accordance with the notice above mentioned and the whole number of votes cast at said meeting on said questions so submitted as aforesaid. was one hundred and ninety-
93 four and the said votes was cast as follows..... 194
One hundred to wit, aid for the railroad. Yes..... 100
Ninety-three votes to wit, aid for the railroad. No..... 94
Majority in favor of aid for the railroad. Yes, seven..... 7
Recorded July 26th, 1866.

STATE OF MICHIGAN,
St. Joseph County, Township of Nottawa, ss:

It is hereby determined and certified by the board of inspectors of elections of said township, that at the special township meeting held therein on the 11th day of July, A. D. 1866, for the purpose of determining the question of raising money in aid of the Grand Rapids and Indiana Railroad in manner and form as above set forth, said questions being submitted to a vote of the taxable property-holding electors of said township by the greater number of votes, the said questions were determined in the affirmative by a majority of seven votes, and for rais-

ing fifteen thousand dollars in manner and form as submitted and above set forth.

J. RUTHERFORD,
Supervisor.
SAMUEL W. PLATT,
Justice.
P. EATON, *Town Clerk.*

94 STATE OF MICHIGAN,
St. Joseph County:

To the township clerk in and for the township of Nottawa:

We, the undersigned, freeholders in said township, request you to call a special township meeting of the taxable property holding electors thereof, to be holden on the eleventh day of August, A. D. 1866, at the court-house hall, in the village of Centreville, for the purpose of raising one thousand dollars to aid the Grand Rapids and Indiana Railroad Company. Also to take into consideration the propriety of issuing bonds for the fourteen thousand dollars voted by the freeholders and property holding electors in said township, on the 26th day of August, A. D. 1864, the former vote limiting the time of issuing said bonds till the Grand Rapids and Indiana Railroad should be completed from Sturgis to Kalamazoo, and ready for the cars to run on said railroad. But instead of issuing said bonds at the time fixed by said vote, to issue them whenever the ties shall be furnished and delivered on the line of the railroad, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road crossings shall be fully completed and ready
95 for the iron in said township of Nottawa. Said fourteen or fifteen thousand dollars to be raised by tax on the general list of said township, and if bonds are issued they shall draw seven per cent. per annum, said bonds to be drawn payable as follows, viz: Four thousand dollars payable one year from the date thereof; four thousand dollars payable 2 years from the date thereof; four thousand dollars payable three years from the date thereof, and the remainder payable four years from the date thereof.

Dated Nottawa, July 17th, 1866.

Samuel Chipman.
John S. Weeks.
F. Gooden.
William Laffey.
S. Frankish.
Henry Lohr.
H. W. Laird.
Wm. Allison.
O. W. Wilcox.
J. W. Fletcher.
Thomas Eagle.
Robert Fair.
Ezekiel Flanders.
Joseph Olney.
S. J. Foreman.
S. Oman.
Wm. Simpson.

SPECIAL TOWNSHIP MEETING.

Pursuant to sec. No. 2, of act No. 69, of the laws of the State of Michigan, approved February 5th, A. D. 1864, and entitled "An act to authorize the several townships in any of the counties on the line of the Grand Rapids and Indiana Railroad to aid in the construction of
96 said railroad," and pursuant to the written request of fifteen freeholders of the township of Nottawa, notice is hereby given to the taxable property holding electors of the township of Nottawa that there will be a special township meeting of the said taxable property holding

electors of the said township of Nottawa, in St. Joseph County and State of Michigan, at the court-house hall, in the village of Centreville, in said township, on the 11th day of August, A. D. 1866, commencing at 9 o'clock a. m. of said day, and closing at 3 o'clock p. m. of said day, for the purpose of deciding by ballot whether aid for the construction of the railroad across said township in the manner provided by law, and pursuant to the said written request of the said fifteen freeholders hereto annexed, shall or shall not be granted by the said taxable property holding electors of said township.

Dated Centreville, July 23, 1866.

P. EATON,
Town Clerk.

The defendant recalled witness Eaton, who testified that there is no other record of this meeting than this one; that he made the record offered in evidence; and upon cross-examination he further testi-
97 fied, when he made the record, he had the call of the meeting before him, and in copying the call into the record he must have omitted the expression, "two years from date; four thousand dollars payable in two years from date"; that he had the request before him at the time he made the record; that he tried to copy it correctly; that the record was made after the township meeting was held.

The defendant, further to maintain and prove the issue on its part, called as a witness one Charles A. Palmer, who testified, amongst other things, that he resided in the township of Nottawa, and had lived there many years. He was acquainted with the Grand Rapids and Indiana Railroad, and with the line of the road passing through the township of Nottawa from north to south. He knew its condition on the 17th of January, 1867; and thereupon the defendant's counsel asked the witness the following question: State whether, at that time, the road-bed of that railroad was completed and ready for the iron through that township; to which the defendant's counsel objected, upon the ground that it was irrelevant and immaterial; that under the law the township board or officers were made the judges of that question, and that they passed upon it
98 by issuing the bonds and that their determination of the question was conclusive, which cannot be contradicted in this case; and, secondly, that it is at this time immaterial because it is already shown and conceded that said railway is completed and is now running through the town and has been ever since its completion. That the township had derived all the benefit contemplated from the building of the road, for which the bonds were issued. But the court overruled the said objection and decided that said testimony was admissible, to which ruling and decision the counsel for the plaintiff then and there excepted. And the witness in answer to said question gave evidence tending to show that on the 17th day of January, 1867, the said road-bed was not completed ready for the iron through the township of Nottawa; that considerable of the work had been done yet; that there was quite a large amount of excavation that was not yet done at a place known as Skelenger Hill, and a deep fill probably twelve feet in height, two-thirds of it probably had yet to be made. That the length of the hill through which the cut was not yet completed was perhaps from fifteen to twenty
99 rods. And that the cattle guards and road crossings were not put in at that time. That there was six road crossings through the township; that the road ran through the township for a distance of about six miles and a quarter.

On cross-examination, the plaintiff's counsel asked the witness to state

at what time the said railroad was *was* completed and at what time it was first operated as a railroad through the township; to which question defendant's counsel then and there objected upon the ground that it was irrelevant and immaterial and not proper cross-examination; which objection the said court sustained and refused to admit the said evidence; to which ruling and decision of the court the plaintiff's counsel then and there excepted.

The defendant's counsel here offered in evidence act number 69 of the legislature of the State of Michigan of the session of 1864, and also called and examined some other witnesses, who gave evidence tending to show that said road-bed through said township, on the 17th day of Jan'y, 1867, was not completed ready for the iron, and that none of the road crossings and cattle guards were constructed.

The defendants' counsel further called as a witness one M. M.
100 Stimpson, who testified, amongst other things, that he was a civil engineer and was in the employ of the Grand Rapids and Indiana Railroad Company, and still is, and had charge of this work on the Grand Rapids and Indiana Railroad through the township of Nottawa in the year 1867. On the 17th of January, 1867, there were about twenty-five hundred yards of earth-works to be done to complete the work across the township, and that the cattle guards were not in nor were the crossings completed; and thereupon the defendant rested his case.

The plaintiff, further to maintain and prove the issue on his part, introduced as a witness one Jonathan G. Waite, who testified that he resided at Sturgis, Michigan; that he knew Samuel Kline and William Connor and the Grand Rapids and Indiana Railroad Company; that in 1866 and 1867 the witness was a director in the Grand Rapids and Indiana Railroad Company, and was also appointed as special agent to perform certain duties between Sturgis and Kalamazoo. I was to see to the grading, letting of contracts, and to the charge of the bonds. I gave said Connor and Kline authority to receive the bonds verbally and in writing. The writing was produced and shown to the witness,
101 and after being proved and identified was introduced in evidence and read as follows:

Mr. Samuel Kline and William Connor are fully authorized to take charge of the railroad work in the township of Nottawa and furnish means for the prosecution of the work through said township until such work is done; and to negotiate the bonds of said township for the payment of said work at ten per cent. interest to the amount of what orders have been given on said township of Nottawa to said Kline and Connor.

Nottawa, September 7th, 1866.

J. G. WAITE,
Agent of the Grand Rapids and Indiana Railroad Company.

The plaintiff then produced and read in evidence the record of a meeting of the board of directors of the Grand Rapids and Indiana Railroad Company on the third day of July, 1866, and the same was read to the jury. Said record was in the following words and figures: "On motion, resolved that J. G. Waite be, and he is hereby, appointed agent of the company to superintend the work now in progress from the south line of the town of Sturgis, in the State of Michigan, to the village of Kalamazoo, and appropriate the township bonds voted along the line in
102 the several townships through which the road passes in payment of said works; and also to make settlements of the right of way

and other such matters as may be necessary for the best interest of the company." The witness Waite further testified that he gave the said Kline and Connor orders for the bonds of the township of Nottawa to the amount of twelve thousand dollars.

The plaintiff, further to maintain and prove the issue on his part, called the witness William Connor, who testified that he resided in the township of Nottawa; that he had the bonds in suit in his possession; that he procured them from the township of Nottawa on the 17th of January, 1867. At the time I received the bonds of the township board, I agreed to keep them until the work on the railroad was completed. Mr. Kline and I proposed to give them a bond that should be satisfactory to them in amount, and to take those bonds to hold.

Thereupon the plaintiff's counsel asked the witness the following question: Did you advance any money to any person or persons on those bonds, or any of them?

The defendant's counsel objected to said question, on the ground that it was irrelevant and immaterial, unless it is confined to purchasers of the bonds from the township.

103 And the court then and there sustained the objection to said question, and ruled as follows:

We think there is no evidence justifying the court in taking the view that as yet Kline and Connor were in any sense agents of the township in any of the transactions in reference to the bonds, whatever they may have done in reference to those bonds under the present proofs in the case. I see the testimony is all in one direction; that they either acted for themselves, individually, or as the agents of the railroad company. The plaintiff's counsel claim that no bonds were parted with by Kline and Connor until the road was completed. I must hold the objection well taken. I can see the possibility of the plaintiff making such proofs in this case as would make a very close question as to the rights of Kline and Connor in these bonds; but I think there is nothing in the proof in the present stage of the case that would justify the admission of the testimony proposed. I think if the evidence should show that Kline and Connor were to receive those bonds and hold them in escrow for the township, in pursuance of and arrangements made to that effect between the supervisors and clerk, and that after the road was completed, the township, through these officers, consented to Kline and

104 Connor appropriating these bonds or using them in behalf of the railroad, it would be a very close question. At the same time, in such a case, with my present impression, I should be obliged to exclude the evidence.

And thereupon the court excluded the evidence; to which ruling and decision the plaintiff, by his counsel, then and there excepted.

And thereupon the plaintiff's counsel offered and proposed to prove by said witness that witness and Kline had an arrangement with the Grand Rapids and Indiana Railroad Company by which said witness and Kline were advancing, and did advance, large sums of money, and were doing, and did do, large amounts of work on the line of the road through the township of Nottawa, and that they were to have these bonds in payment for this money advanced for this work and labor, so far as the bonds would go, as soon as the railroad company should be entitled to them, as soon as their work had advanced far enough to entitle the railroad company to the bonds; that, knowing this situation and this agreement between Kline and Connor and the railroad company, the township board agreed with Kline and Connor they would deliver those bonds to Kline and Connor; that, under an arrange-

105 ment and understanding that they would hold them until such time as the railroad should be fully completed, in such a manner as that, under the statute, railroad company would be entitled to bonds. That they took the bonds to keep them in that manner until the railroad was fully completed; that it was fully completed in 1869 or '70, and that the cars ran over it then and ever since, and in the mean time the railroad company turned over these bonds to Kline and Connor, in payment of the work and labor and money expended as aforesaid; that they did keep said bond', with the exception of six of them. They were taken without their knowledge and consent, and negotiated.

To this proposition and proposal to prove the same by the witness, the counsel for the defendant then and there objected, on the ground that it was irrelevant and immaterial, and would not make out a case on part of the plaintiff, if proved; and the court thereupon sustained the objection, to which ruling and decision of said court the counsel for the plaintiff then and there excepted.

With a view to prove the propositions aforesaid, as stated, the counsel for the plaintiff put the following question to the witness:

106 State under what arrangement, if any, with the township board you took the bonds in question; state whether you and Kline had any arrangements with the railroad company under which you were to do any work and advance any money for the construction of the railroad through the township of Nottawa.

Each of the questions were severally objected to on the ground that they were too general, and called for the opinion of the witness, and were irrelevant and immaterial.

The court sustained the objection, and each of said ruling and decision the plaintiff, by *by* its counsel, then and there excepted.

The witness further testified: I kept all of the bonds except seven of one hundred dollars each, which I delivered to my son and he negotiated them, and after the road was completed and cars run upon it, which was in June, 1870, I had orders from Mr. Waite as agent of the railroad company for these bonds and deposited those orders in the township clerk's office of Nottawa when I received the bonds. I do not know where they are now. I have made a search for them in the township clerk's office and could not find them. I applied for a copy of them to the township clerk, and he said he had looked and they were

107 not there; that he had never seen them. These orders were for ten thousand dollars of the bonds. I knew that the township board had seen these orders, because they had them in their hands and endorsed on the back of them that they should have the preference over any other orders for the township bonds.

Thereupon plaintiff's counsel put the following question to the witness: Was there any arrangement between you and the township board by which you were to hold the bonds until the work was done?

Which was objected to by the defendant's counsel on the ground that it was leading and calling for the opinion of the witness, and irrelevant and immaterial.

Said objection was sustained by the court, who said to plaintiff's counsel that he so ruled under his general propositions to prove as hereinbefore stated. To which ruling and decision of the court the plaintiff's counsel then and there excepted.

The plaintiff's counsel then put to the witness the following question: At the time those bonds became due to the railroad company, that is, after the road had been finished and completed, how much was the rail-

road owing you and Kline for the work done and money advanced
108 in the construction of the road through Nottawa? This was objected to by the defendant's counsel on the ground that it was irrelevant and immaterial.

The court sustained said objection. To which ruling and decision of the said court counsel for the plaintiff then and there objected.

The witness further testified that he handed the orders for the bonds to the township board, consisting of Eaton, the clerk, John Rutherford, and Mr. Platt, about the first week in September, 1866, and that Eaton made the endorsement upon them before mentioned, which was at Centreville at a meeting of the board. Paul James Eaton was the clerk and he made the endorsement. There was a meeting of the board at that time to consider whether they would give any orders for the bonds, preference to any other order; that he thought Mr. Kline was present, and that witness solicited the board to come together.

The plaintiff, further to maintain the issue on his part, produced as a witness one Bracey Tobey, who stated, amongst other things, that he purchased three of the bonds in question, numbered, he thinks,
109 80, 85, 86, of Mr. Jones, of Sturgis, before they were due, and paid about the par value of them, and at the time he purchased them he knew nothing about the state of the road as to its being completed or otherwise.

The plaintiff was recalled as a witness and testified, amongst other things, that at the time he purchased his three bonds he had no knowledge of the completion or incompletion of the road in question through the township of Nottawa, and purchased them for a valuable consideration and before maturity; and thereupon the plaintiff rested his case.

And said court thereupon, on his own motion, charged and instructed said jury as follows:

It is permissible, gentlemen of the jury, in civil action when the court is of opinion that a plaintiff cannot recover, and for that reason would set aside a verdict if rendered contrary to such opinion, to so announce to the jury.

If the court in this case is of opinion that the plaintiff cannot recover the full amount which he asks and would grant a new trial should your verdict be for such full claim, why shall not the court tell the jury so? What we shall say will exclude a recovery of part of the claim.
110 There has been documentary evidence produced upon the trial, and the law under which the proceedings of the township were had has been introduced in evidence.

By these records it appears that there was an application for a township meeting to vote upon the question of railroad aid to the Grand Rapids and Indiana Railroad Company by way of issuing bonds. The request was specific. There was a call under it by the proper authority of the township; there was a vote of the electors. The inspectors of election, according to the record, determined that the township had voted aid by its bonds in the construction of the railroad. There is no documentary or record evidence that the township board directed the supervisor and clerk to execute and deliver bonds; but there is evidence that subsequent to the vote the supervisor and clerk of the township signed bonds to the amount of fourteen or fifteen thousand dollars. We have no hesitation in instructing the jury that the proceedings which were had authorized the issuance of bonds by the township of Nottawa to aid in the construction of the Grand Rapids and Indiana Railroad. It further appears in evidence that the bonds which were

111 thus executed by the supervisor and clerk were placed in the hands of Connor and Kline, contractors upon the road in that township for doing the work of completing it through the municipality, and that such bonds were placed in the hands of these parties, Kline and Connor, prior to the road bed having been completed. The law authorized the issuance of the bonds only when the road bed should have been completed substantially ready for the iron. But that there may be no mistake about that, I will call your attention to the language of the statutes:

"No bonds shall be delivered or paid over to the said railroad company until the ties shall be furnished and delivered on the line of the road, and the road bed thereof, including all bridges, culverts, cattle-guards, and road-crossings, shall be fully completed and ready for the iron within the limits of the municipality rendering such aid."

The evidence seems to be overwhelming in the case, that that condition was not performed at the time the bonds were delivered to Kline and Connor.

To which last ruling, charge, opinion, and decision of said court the plaintiff, by its counsel, then and there excepted.

112 "And if you shall agree with the court that such fact is proven in the case, and about which I apprehend you will have no difficulty whatever, because it is all on one way, then the court instructs you that the bonds in Kline and Connor's hands, and others into whose hands they had come, with notice of the fact of such premature issue, would be invalid. They were placed in the hands of Kline and Connor without authority, for nobody had authority to deliver the bonds until the conditions stated in the statute had been performed."

To which last ruling, charge, opinion, and decision of said court the plaintiff, by its counsel, then and there excepted.

"The court instructs you that so far as any of said bonds are shown to have been acquired by any person with notice of the fact, to wit, that the road had not been thus completed as required by law, there can be no recovery as to such bonds in this case."

To which last ruling, charge, opinion, and decision of said court the plaintiff, by its counsel, then and there excepted.

"There can be no verdict in favor of the plaintiff for any portion of the bonds acquired by any person or persons having notice at the time of receiving them of the unfinished condition of the road when the bonds were issued."

To which ruling, charge, opinion, and decision of said court the plaintiff, by its counsel, then and there excepted.

But we think so far as the bonds were allowed by the township, through its officers, to be issued and put afloat upon the community, whether through Kline and Connor or otherwise, which came into the hands of bona fide holders for a valuable consideration, without notice that the road had not been completed when the bonds were thus issued, that as to such bonds there may be a recovery.

According to the evidence there would seem to be six such bonds, about which there would not seem to be any question as to the plaintiff's right to recover, as a bona fide holder, for value, and without notice of any illegality in the proceedings of issuing the bonds, the first six about which the plaintiff testified, amounting to $600 and accrued interest. If, however, you should think there were but three of the bonds which Williams thus purchased, and that those which Mr. Toby had, and which he owns to-day in equity, although passed into the plaintiff's hands for collection, were not purchased by Tobey bona fide without

notice, then your verdict should be for only three of the bonds
114 mentioned. Mr. Tobey's testimony seemed to be very clear that he knew nothing about the circumstances affecting the validity of the bonds, yet there is the circumstance that he lived, I think, adjoining the town of Nottawa; was occasionally at Centreville, and in going there had to cross this road; he went there, he stated, once or twice a year.

The jury may say, under all the circumstances, whether at the time he purchased the three bonds he had notice of the unfinished conditions of the road at the time they were delivered to Kline and Connor.

So far as Mr. Williams is concerned in reference to three bonds purchased by him, I remember no testimony in the case which tends in the slightest to show that he had any notice of non-performance on the part of the railroad; that is, as to the completion of the road at the time the bonds were delivered. He purchased them, I think, in 1867, in September, I think. If, however, the jury find there is any evidence that Williams had notice, of course that would alter the case. The evidence is very clear that he paid a valuable consideration for the three bonds.

Now, if there is to be a loss in reference to the three or six bonds
115 mentioned, who should sustain that loss? If the fault is on the part of the township and its officers—if they have acted wrongfully—have put these bonds in circulation when they ought not to have done so, and contrary to the provisions of the statutes, and those bonds have gone in the hands of an innocent purchaser, who ought to suffer, the innocent purchaser, without notice, or the township who selects such agents to perform the duties of the town in view of the vote by the municipality? The law as well as the equity is, I think, very clear in such a case.

As you find the facts, so you will find for the plaintiff or defendant. If for the plaintiff, you will say what amount he is entitled to recover, giving him interest at seven per cent. since the date of the bonds, January 17, 1867.

An objection has been raised by the defendant, that these bonds were payable seventeen days before the proposition and the vote authorized. We think it is immaterial as to all innocent purchasers.

The township, for its own convenience, may have changed the time the bonds should fall due.

We rule upon the point specially, so that the defendant may have
116 the benefit of the ruling. Gentlemen, you may take the case and say how you find.

To each and every part and paragraph of said charge separately, the said defendant's counsel then and there excepted.

And, inasmuch as none of the foregoing exceptions appear in the records and proceedings of said case, the said judge of said court has, at the request of the plaintiff's counsel, signed this bill of exceptions this 8th day of June, 1876.

S. L. WITHEY,
Dist. Judge.

(Indorsed:) U. S. cir. court, west. dist. M. In law. S. P. Williams vs. T'p of Nottawa. Bill of exceptions. Filed June 8, '76. C. B. Hinsdill, clerk.

117 The circuit court of the United States for the western district of Michigan.

SAMUEL P. WILLIAMS
vs.
THE TOWNSHIP OF NOTTAWA.

MARCH 9, 1877.

On reading and filing the stipulation of H. H. Riley, attorney for the plaintiff in the cause, and on his motion, ordered that Hughes, O'Brien & Smiley, be and are substituted as attorneys of record for the plaintiff herein.

H. H. RILEY,
Attorney for Plaintiff.

(Indorsed:) U. S. circuit court, west'n dist. Mich. Samuel P. Williams vs. The Township of Nottawa. Substitution. Filed Mar. 9. '77. C. B. Hinsdill, clerk.

118 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Chester B. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the files and records and all of them in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court, in Grand Rapids, this 28th day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] CHESTER B. HINSDILL,
Clerk.

By A. B. CARRIN, *Deputy.*

(Indorsement on cover:) No. 339. Samuel P. Williams, plaintiff in error, vs. The Township of Nottawa. W. Michigan C. C. U. S. Filed 18th November, 1878.

REC. 339—5

SUPREME COURT U.S.
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SUPREME COURT

—OF THE—

UNITED STATES.

SAMUEL P. WILLIAMS,
Plaintiff in Error,
vs.
THE TOWNSHIP OF NOTTAWA.

No. 93, OCTOBER TERM, 1881.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

HUGHES, O'BRIEN & SMILEY,
Counsel for Plaintiff in Error

GRAND RAPIDS, MICH.
DYGERT, BUFF & RICE, Legal and Commercial Printers.
1881.

SUPREME COURT

—OF THE—

UNITED STATES.

SAMUEL P. WILLIAMS,
Plaintiff in Error,
vs.
THE TOWNSHIP OF NOTTAWA.

No. 93, OCTOBER TERM, 1881.

STATEMENT OF THE CASE.

The plaintiff in error brought this action against the township of Nottawa, to recover upon certain bonds and coupons, issued by the township of Nottawa to the Grand Rapids and Indiana Railroad Company, to aid in the construction of its road.

The bonds were dated January 17th, 1867, were numbered from one to ninety-one inclusive, and ranged in amount from one hundred to one thousand dollars, and amounted in all to fifteen thousand dollars, exclusive of the coupons attached, representing the interest. See Record, pp. 35 and 36.

The plaintiff, after proving that in the year 1866–7, John Rutherford was Supervisor, and Paul James Eaton was Clerk of said Township, and that they, as such, signed said bonds, introduced in evidence a record of a meeting of the township board, held in said township, January 17th, 1866, at which the township board, consisting of said officers, and S. Chipman, a justice of the peace, resolved to issue said bonds. The plaintiff then introduced said bonds and coupons in evidence, and they were received and read to the jury. (See Record, pp. 37 and 38.)

The defendant then entered upon its defense, which was, that the bonds were issued and put in circulation by the township board or township officers, before the railroad-bed was fully completed, ready for the iron, through the township of Nottawa.

The act of the Legislature of Michigan, under which these bonds were issued, will be found printed at the close of this brief.

On the 11th day of July, A. D. 1866, the township of Nottawa held a meeting to vote upon the question of issuing bonds to the amount of fifteen thousand dollars, to aid the Grand Rapids and Indiana Railroad Company in the construction of its road.

No question was made upon the trial against the regularity of the proceedings by which said bonds were voted, and the Court in his charge to the jury, said that he had no hesitancy in saying that the proceedings authorized the issuance of the bonds. See Record Folio 110.

Samuel Kline and William Connor were farmers living in said township and engaged as contractors in building a por-

tion of said road which extended through said township. In the prosecution of the work they had advanced large sums in material and labor to construct the road. One J. G. Waite was the agent of the railroad company, and in behalf of the company had given Kline & Connor an order for these bonds and authority to receive them.

Kline & Connor were fearful that the township board would issue said bonds to other parties who claimed to have orders for them, and urged the township board to sign the bonds and put them in the possession of said Kline & Connor until the railroad should be fully completed.

The railroad was nearly completed through the township at this time, January 17th, 1867, and was afterwards fully completed and operated.

The township board on the 17th day of January, 1867, resolved to issue said bonds and place them in said Kline & Connor's hands until such time as the railroad company was entitled to them, taking a bond as security that said Kline & Connor would complete said road through said township according to the requirements of the statute.

The sole object of this action seems to have been to secure the bonds for Kline & Connor, as against other creditors of the railroad company.

On the trial the plaintiff was called as a witness by the defendant, and testified that aside from six of these bonds, they were all received by him from Samuel Kline or William Connor for collection in the Spring of 1874. That as to said six he purchased three of them in 1867, and three more were assigned to him in 1869 or 1870 by Bracey Tobey for collection.

Upon the six bonds last named the plaintiff recovered judgment, but upon the remainder he did not, and it is because the plaintiff was not allowed to recover upon said bonds that this writ of error is brought.

Paul James Eaton was called as a witness for defendant, and he was allowed against the objection of plaintiff's counsel to give testimony tending to dispute and impeach the township record introduced in evidence, and which he as township clerk had made, and which had been signed by the other members of the township board. See Record, p. 39; Folios 77 and 75.

The defendant was allowed against the plaintiff's objection to prove by the township records, that S. Chipman, who acted as a member of the township board, was not in fact the oldest justice of the peace of the township, and therefore not entitled to act as a member of the board, the statute of Michigan providing that the board shall consist of the Supervisor, Clerk and two senior Justices of the Peace. See Record p. 39; Folio 78.

The defendant was allowed to offer evidence that no formal vote was taken, or resolution made at the meeting of the township board at the time said bonds issued, and this against the plaintiff's objection. See Record p. 39 and 40; Folio 79.

The witness Eaton was permitted upon the trial to testify against the objection of the plaintiff's counsel, that he knew of no stock or securities being delivered to the board or into the hands of the township treasurer. See Record p. 41; Folio 82.

The call for a meeting under the act of the Legislature, the vote of the electors upon the question, and the result of

the election in favor of issuing the bonds as declared by the township board, were all offered in evidence by the defendant. See Record pp. 43 to 46 inclusive.

The rulings of the Court in admitting these several matters in evidence against the plaintiff's objection, are complained of as being erroneous.

The Court excluded evidence offered by the plaintiff in rebutting, tending to show that Kline & Connor had advanced money in building the railroad under an agreement with the railroad company, that they were to have these bonds in payment for their labor and money advanced, as soon as the railroad company was entitled to them, and that knowing this agreement the township board agreed that they would deliver these bonds to Kline & Connor, to hold until such time as the road was completed in such a manner that under the statute the railroad company would be entitled to the bonds; that the road was fully completed in 1869 or 1870, and that the cars ran over it then and ever since, and that after the completion of the road the bonds were turned over by the railroad company to Kline & Connor. See the plaintiff's offer on pp. 48 and 49 of the Record; Folios 102 to 108.

It is claimed that the Court committed error in this ruling.

The Court charged the jury in substance that the plaintiff could not recover upon any of said bonds, except the three which he purchased in 1876, and the three which were assigned to him by Bracey Tobey in 1869 or 1870. See Record p. 51.

The plaintiff claims that there was error in this charge.

POINTS AND ARGUMENT FOR PLAINTIFF IN ERROR.

I.

The most important question in the case is, whether the Court rightfully instructed the jury that the plaintiff could not recover except upon the six bonds.

According to the plaintiff's theory, the bonds, although signed, were to remain in the hands of Kline & Connor until such time as the railroad company was fully entitled to have and negotiate them.

The railroad was afterwards fully completed, while these bonds remained with Kline & Connor, and cars have been running upon the road ever since. The time arrived when the township, by its officers, should have issued the bonds, when by law the duty rested upon the officers to deliver the bonds to the railroad company, when the right existed on the part of the railroad company to receive and have the bonds.

The township pledged its aid, by its vote, to the railroad company. By the construction of the road the township received all the benefits and abvantages which it expected to receive when it voted to issue these bonds. If it can avoid the payment of these bonds, it must do so upon a mere technicality. There is no equity in the defense. Kline & Connor earned the bonds by constructing the railroad, and had authority from the railroad company to receive the bonds. They were holders for full value, and the town had received full value for these bonds. It is true that they knew that the bonds were signed and placed in their hands for safe keeping before the road was completed, but this was done in entire good faith, and a bond was given, indemnifying the township and its officers.

Was there anything illegal in the signing of these bonds, prior to the time the railroad company was entitled to receive them? We insist not. What was done on January 17th, 1867, by the township officers was not regarded by them, or by Kline & Connor, as a final delivery and issue of the bonds. They were only signed and deposited, upon an understanding that the delivery should take effect and the bonds belong to the payees upon the happening of a certain event—the completion of the road—that event happened, the bonds were due to the railroad company. Their final issue then became perfect by the previous arrangement and consent of the township board and officers. Is there any legal rule or principal which prohibits such an arrangement?

See Moultrie vs. Savings Bank, 2 *Otto*, 631.

Section 3 of the act gives the Supervisors and Clerk power, under the direction of the township board, "to loan money, to execute bonds or other securities, to require securities from the railroad company, and to do all other acts necessary to comply with such determination."

Section 4 provides among other things that "no bonds or other evidences of debt or moneys arising from the sale of the same shall be delivered or paid over to said railroad company until the ties shall be furnished, etc."

Section three seems to give the officers full power te exercise their discretion as to the manner of carrying out the determination of the township.

The only limitation placed upon that power and discretion is contained in section four, viz: that the bonds or money shall not be delivered or paid over to the rail road company until the ties, etc., are delivered.

This limitation was not overreached.

It could not be said that the bonds under this arrangement had been delivered to the railroad company before the completion of the railroad. No one of the officers or parties interested understood that they were finally delivered; they were only deposited. The railroad company had no right to control them or negotiate them. In view of the relations of Kline & Connor to the transaction, they could not be considered as the agents of the railroad company in this arrangement. The railroad company was not a party to the arrangement between Kline & Connor and the township. It was not shown that Kline & Connor had any authority from the railroad company in making this agreement. They were acting for themselves.

A note as well as a deed may be delivered as on escrow.

See Dannells on Negotiable Int., § 68.
Couch vs. Meeker, 2 *Conn.* 302.
Taylor vs. Thomas, 13 *Kan.* 217.
1 *Parson's Notes and Bills*, 51.

The township ought not to be permitted, after entering into this arrangement and receiving all the benefits which it expected to secure from it, to now assert that it was irregular and that the bonds are illegal.

See Munson vs. The Town of Lyons, 12 *Blatch.* 539.
R. R. Co. vs. Notway Co. 47 *Mo.* 349.
Burrows on Pub. Securities, 271.

II.

The township could not contradict its record by parole evidence. This record is required by the Michigan statutes

to be kept by the clerk. It was not only signed by him but also by the Supervisor and Justice of the Peace.

See Comp. Laws of Michigan, Compilation of 1871, *Sec.* 710.
The People vs. Zest 23 *N. Y.* 140.
Abbott's Trial Evidence, 51.
1 *Dillon on Municipal Corp.*, § 233, 234, 235.
Andrews vs. Inhabitants of Boylston, 110 *Mass.* 214.

III.

The court erred in allowing evidence on the part of the defendant that S. Chipman, who acted as a member of the township board, was not the senior Justice of the township.

The statute makes the township board consist of the Supervisor and Clerk and the two Justices of the Peace, whose offices will soonest expire, any three of whom constitute a quorum. When one of these is unable to act or incompetent, one of the remaining Justices may, on being notified, act as a member of the board.

Compiled Laws of Mich., 1871, *Secs.* 706, 707.

These provisions of the Statute are printed at the close of the brief.

The evidence offered did not go far enough to show that Chipman was not a member of the Board. It was only claimed that he was not the oldest justice; under the law he was competent unless there were two older justices, and even in that case he could act unless both the others were competent and able to act.

There is still another reason why this evidence was immaterial. The right of this officer to act as a member of this board could not be enquired into collaterally. It is suffi-

cient that he assumed to act and that no proceedings were taken at the time to question or dispute his right to act.

See Abbotts Trial Evidence pp. 193, 194.
State vs. Carroll 38 *Conn.* 449.
S. C. 12 *Amer. L. R.* 165 *and note by Redfield.*
Wayne County vs. Benoit, 20 *Mich.* 176.

IV.

Possession of the bonds and coupons for the purpose of collection with authority to collect gave the plaintiff sufficient title to maintain the action.

1 *Parsons B. and N.* 50, 51.
Austin vs. Burchard 31 *Vt.* 589.
Hovey vs. Tebring 24 *Mich.* 232.
Way vs. Richardson, 3 *Gray* 412.

If the plaintiff could have recovered upon the bonds in question either upon the evidence introduced, or upon that which was offered by the plaintiff and excluded, then the Circuit Judge was in error in his charge.

It was conceded that these bonds would have been good in the hands of a *bona fide* holder. It was conceded, that the action of the township authorized their issue. It was only claimed that they had not been issued in pursuance of the authority given. We submit that there was evidence tending to show that the bonds were not issued or considered as issued by the parties, until the railroad was in the condition required by the statute to entitle the railroad company to the bonds, and that the jury should have been allowed to pass upon this question under proper instructions.

HUGHES, O'BRIEN & SMILEY,
Counsel for Plaintiff in Error.

RAILROAD AID LAW.

AN ACT to authorize the several townships in any of the counties on the line of the Grand Rapids and Indiana Railroad, to aid in the construction of said railroad.

SECTION 1. *The People of the State of Michigan enact,* That it shall be lawful for any of the several townships, cities and incorporated villages of the counties on the line of the proposed railroad of the Grand Rapids and Indiana railroad company, to pledge the credit of any such municipality, to issue bonds or other securities, to levy taxes, and to borrow money to aid in the construction of said railroad, for any sum not exceeding ten per centum of the assessed valuation of the property of any such municipality, at any special meeting called for that purpose, as hereinafter directed.

SEC. 2. It shall be the duty of the clerk of any of said municipalities to call a meeting of the taxable property holding electors thereof, on the written or printed request of fifteen freeholders of his municipality, which request shall specify the amount to be raised, the mode of raising it, the rate of interest, which shall not exceed seven per cent. per annum, the time of payment, and such other matters as may be deemed for the interest and security of the municipality; and in posting notices according to law, he shall also, with each notice, post the request upon which the meeting is called. The questions submitted to the electors shall be

those contained in the call for the meeting; and those who vote in the affirmative, shall vote a ballot on which is written or printed, "aid for railroad—yes;" and those who vote in the negative, shall vote a ballot on which is written or printed, "aid for railroad—no." The meeting shall be conducted in the same manner as annual meetings are conducted, and the result shall be certified by the board of inspectors, and filed in the office of the clerk.

Sec. 3. If it shall be determined at such meeting to aid in the construction of said railroad, it shall be the duty of the supervisor and clerk, by direction of the township board and president and clerk of the incorporated villages, by direction of the trustees, as the case may be, or the mayor and clerk of any city, by direction of the common council, to loan money, to execute bonds or other securities, to require securities from the railroad company, and to do all other acts necessary to comply with such determination; and all moneys or securities accruing to said township, city or incorporated village under this act, shall be deposited with the treasurer thereof, and held by him until delivered up upon proper authority, or to his successor in office: *Provided*, That the amount of bonds which shall fall due in any one year shall not exceed two per centum of the assessed valuation of such municipality at the time of issuing the same.

Sec. 4. The township board of any township authorized by this act, and the proper officers of any such city or incorporated village, shall have power, and it shall be their duty, to raise, by tax or otherwise, such sum or sums as shall be sufficient, from time to time, to pay the principal and interest of said bonds or other obligations, as often as they shall become due: *Provided*, That no bonds, or other

evidences of debt, issued under the provisions of this act, shall be sold for less than their par value, nor such bonds, or other evidences of debt, or the moneys arising from the sale of the same, be delivered or paid over to said railroad company until the ties shall be furnished and delivered on the line of the road, and the road-bed thereof, including all bridges, culverts, cattle-guards and road crossings, shall be fully completed and ready for the iron within the limits of the municipalities rendering such aid.

Sec. 5. This act shall take immediate effect.

Approved February 5, 1864.

STATUTE RELATING TO TOWNSHIP BOARD.

(706) SEC. 70. The Supervisor, the two Justices of the Peace, whose term of office will soonest expire, and Township Clerk, shall constitute the Town Board, any three of whom shall constitute a quorum for the transaction of business.

(707) SEC. 71. When from any cause there shall not be three of the officers constituting such board, competent or able to act, one of the remaining justices, on being notified by any member of said board, shall meet with any members of said board, and shall have the same authority as the other members of the board.

(710) SEC. 74 The Township Clerk shall be the clerk of such board, and shall keep a true record of all their proceeding in his office.

SUPREME COURT

—OF THE—

UNITED STATES.

SAMUEL P. WILLIAMS,
Plaintiff in Error,
vs.
THE TOWNSHIP OF NOTTAWA.

ASSIGNMENT OF ERRORS.

And now comes the said plaintiff in error by Hughes, O'Brien & Smiley, his counsel, and says that in the record and proceedings in said Circuit Court in this cause, there is manifest error, to wit:

First. The Circuit Court erred in admitting evidence against the plaintiff's objection to impeach and contradict the record of the meeting of the township board.—Folios 77 and 78.

Second. The said Court erred in admitting the record of the township to show that Samuel Chipman was not the oldest justice of the peace.—Folios 78 and 79.

Third. The said Court erred in admitting evidence to show that no formal vote or resolution was taken to issue the bonds in question.—Folios 79, 80, 81 and 82.

Fourth. The said Court erred in admitting evidence that the witness Eaton did not know of any stock or securities being delivered to the township or treasurer.—Folio 82.

Fifth. The said Court erred in admitting the testimony of S. W. Platt, that he was not present at the township meeting, January 17, 1867.—Folio 85.

Sixth. The said Court erred in admitting in evidence the bond given by Kline & Connor, to the township officers.—Folio 87.

Seventh. The said Court erred in sustaining the defendant's objection to the testimony of William Connor, offered by the plaintiff on rebutting. Folios 102, 103, 104, 105, 106, 107 and 108.

Eighth. The said Court erred in charging the jury in substance, that the plaintiff could not recover except upon six of the bonds.—Folios 109, 110 and 112.

Ninth. The said Court erred in charging the jury as follows: "What we shall say will exclude a recovery of part of the claim."—Folio 110; and in saying: "They (the bonds) were placed in the hands of Kline & Connor without authority." "The Court instructs you that as far as any of said bonds are shown to have been acquired by any person with notice of the fact, to wit: that the road had not thus been completed as required by law, there can be no recovery as to such bonds in this case."—Folio 112. "There can be no verdict in favor of plaintiff for any portion of the

bonds acquired by any person or persons having notice at the time of receiving them, of the unfinished condition of the road when the bonds were issued."—Folio 112

And for the errors aforesaid, contained in the said record and proceedings of the said Circuit Court, as well as in the charge of said Court to the jury, said plaintiff in error prays that the said judgment may be set aside, reversed, vacated and held for naught.

HUGHES, O'BRIEN & SMILEY,
Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
OCT 7 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

No. 93.

SAMUEL P. WILLIAMS,
Plaintiff in Error,

vs.

THE TOWNSHIP OF NOTTAWA,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT.

COLDWATER:
A. J. ALDRICH & CO., PRINTERS.

SUPREME COURT

OF THE

UNITED STATES.

SAMUEL P. WILLIAMS,
Plaintiff in Error,

vs.

THE TOWNSHIP OF NOTTAWA,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT.

I.

From the printed declaration in this cause (Record pages 3 to 30 inclusive) it will be seen that the suit was originally brought to recover on ninety-one township bonds, numbered from 1 to 91 inclusive, each with coupons attached, and

averred to have been issued January 17, 1867, in accordance with a vote of the qualified electors of the township of Nottawa to aid in the construction of the Grand Rapids and Indiana Railroad, under and by virtue of the provisions of an act of the Legislature of the State of Michigan, alleged to have been passed to authorize the issuing of such bonds. That these were proper averments see 1 Dill. on Municipal Corporations, 3d edition, § 509.

It appears also by the testimony of the plaintiff, S. P. Williams, on pages 38 and 39 of the printed record, that he only owned three of these bonds, and that three other of these bonds were owned by one Bracey Tobey, who had only transferred them to the plaintiff for collection, and that the remainder of the bonds in suit had been transferred to him for collection by and belonged to William Connor and Samuel Kline, the persons who, as appears, procured their issue from the Township Board, and who, as their evidence shows, were residents of said township, and fully cognizant of all the facts and circumstances and alleged irregularities and illegalities under which the bonds were issued. See particularly on this point printed copy of bond of Kline and Connor, pages 42 and 43 of printed record, and the testimony accompanying the same.

The plaintiff and the said Bracey Tobey each claimed to be bona fide purchasers of the said bonds respectively so held by each of them, before due, for a valuable consideration and without notice of any facts or circumstances constituting any defense to the same, (see record, page 50) and under the charge of the Court

(pages 51 and 52 of record) the jury in the court below rendered a verdict (page 35 of record) in favor of the plaintiff for the amount of the said six bonds and interest, and judgment for said amount ($994.57) and costs was thereupon entered in favor of the plaintiff against the defendant. The plaintiff claiming a right to recover on all the bonds brings the case to this court by writ of error. A printed copy of one of the bonds in suit appears on page 36 of the record.

No question therefore arises in the case as to the rights of a bona fide purchaser of the bonds before due for a valuable consideration, and without notice of any defense to them.

The balance of the bonds on which plaintiff failed to recover are owned by parties who procured their issue to themselves with a full knowledge of all the facts and circumstances and alleged illegalities on which the defense is based.

Act No. 69 of the session of the Legislature of the State of Michigan for the year 1864, page 134, approved February 5, 1864, under which the plaintiff claims the bonds in suit were issued, is as follows:

"An act to authorize the several townships in any of the counties on the line of the Grand Rapids and Indiana Railroad to aid in the construction of said railroad."

SECTION 1. *The People of the State of Michigan enact*, That it shall be lawful for any of the several townships, cities, and incorporated villages of the counties on the line of the proposed railroad of the Grand Rapids and Indiana Railroad Company, to pledge the credit of any such municipality, to issue bonds or other securities, to levy taxes, and to borrow money to aid in the construction of said railroad, for any sum not exceeding ten per centum of the assessed valuation of the property of any such municipality, at

any special meeting called for that purpose, as hereinafter directed.

SEC. 2. It shall be the duty of the Clerk of any of said municipalities to call a meeting of the taxable property holding electors thereof on the written or printed request of fifteen freeholders of his municipality, which request shall specify the amount to be raised, the mode of raising it, the rate of interest, which shall not exceed seven per cent. per annum, the time of payment, and such other matters as may be deemed for the interest and security of the municipality; and in posting notices according to law, he shall also, with each notice, post the request upon which the meeting is called.

The questions submitted to the electors shall be those contained in the call for the meeting; and those who vote in the affirmative shall vote a ballot on which is written or printed, "Aid for railroad—yes;" and those who vote in the negative shall vote a ballot on which is written or printed, "Aid for railroad—no." The meeting shall be conducted in the same manner as annual meetings are conducted, and the result shall be certified by the Board of Inspectors, and filed in the office of the Clerk.

SEC. 3. If it shall be determined at such meeting to aid in the construction of said railroad, it shall be the duty of the Supervisor and Clerk, by the direction of the Township Board, and President and Clerk of the incorporated villages, by direction of the Trustees, as the case may be, or the Mayor and Clerk of any city, by direction of the Common Council, to loan money, to execute bonds, or other securities, to require securities from the Railroad Company, and to do all other acts necessary to comply with such determination; and all moneys or securities accruing to said township, city, or incorporated village under this act, shall be deposited with the Treasurer thereof, and held by him until delivered up upon proper authority, or to his successor in office: *Provided*, That the amount of bonds which shall fall due in any one year shall not exceed two per centum of the assessed valuation of such municipality at the time of issuing the same.

SEC. 4. The Township Board of any township authorized by this act, and the proper officers of any such city or incorporated village, shall have power, and it shall be their duty, to raise, by tax, or otherwise, such sum or sums as shall be sufficient, from time to time, to pay the principal and interest of said bonds or other obligations, as often as they shall become due: *Provided*, That no bonds, or other evidences of debt, issued under the provisions of this act, shall be sold for less than their par value, nor such bonds, or other evidences of debt, or the moneys arising from the sale of the same, be delivered or paid over to said Railroad Company until the ties shall be furnished and delivered on the line of the road, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road-crossings, shall be fully completed and ready for the iron within the limits of the municipalities rendering such aid.

SEC. 5. This act shall take immediate effect.

Approved Feb. 5, 1864.

II.

The printed record, pages 37 to 51 inclusive, contains eighteen exceptions of plaintiff to the rulings of the Court, fourteen of which are in relation to the admission of evidence; and the first exception, on page 37, is to the ruling of the Court sustaining the objections of the defendant to the admission of the bonds in evidence until the lawful authority of the township officers who had professed to issue them was first shown. The execution of the bonds by the defendant had been denied under oath, in addition to the plea of general issue (see page 33 of rec-

ord) and under the Michigan practice in such a case the burden of proof was on the plaintiff to show the lawful execution of the bonds.

Mich. Cir. Co. Rule 79:

"Upon the plea of the general issue in an action upon any written instrument, under seal or without seal, the plaintiff shall not be put to the proof of the execution of the instrument or the hand-writing of the defendant, unless the defendant, or some one in his behalf, shall file and serve a copy of an affidavit, denying the same," etc.

People v. Johr, 22 Mich., 461.
Ortman v. Bank, 41 Mich., 482.
Rev. Stats. U. S., 2d Ed., 1878, page 174, § 914.

2. The plaintiff had also averred in his declaration (record, pages 3, 4, and 29) the compliance with or performance of certain conditions precedent, therein specified, authorizing the issuing of the bonds and asserting their issue, on the 17th day of January, 1867, in accordance therewith, but had made no proof of any of said averments at the time of offering the bonds in evidence, and it is insisted as an elementary proposition that such proof under the circumstances was necessary before the bonds could properly be received in evidence.

1 Chit. Pl., 292, 368 and 320 to 328.

The plea of the general issue in this case also put in issue the question of authority to issue, *bona fides* and notice.

Chambers County v. Clews, 21 Wall., 317.

For form of plea of the general issue in Michigan see 2 Comp. Laws Mich., 1871, § 5,793.

"In all civil actions hereafter to be commenced the general issue shall consist of a demand by the defendant of a trial of the matters set forth in the plaintiff's declaration."

By § 5,792 special pleas in bar are prohibited, and by § 5,794 all matters of defense which had before been required to be pleaded specially or by notice given, defendant might annex to his plea of the general issue a notice of, stating their precise nature.

3. Besides these bonds (see copy of one of them, page 36 of record) contain no recitals in them purporting to show that the conditions precedent, or statutory requirements to authorize their issue had been complied with, and hence no estoppel by recital could be claimed—and as there is no implied authority in a municipal corporation to incur debts or issue bonds in aid of a railroad company, that power in order to exist must be conferred by express grant of the Legislature.

2 Daniel on Neg. Inst., § 1520.

1 Dillon on Municipal Corp., 3d Ed., § 161, (106) and cases there cited in note.

Wells vs. Supervisors, 102, U. S. 625,

and the legislation in this case requiring certain conditions precedent, before the bonds could lawfully issue, and the bonds containing no recitals indicating the performance of those conditions, it was incumbent on the plaintiff to make such proof in the first instance before he could claim them to have been lawfully author-

ized. Dill. on Mun. Corp., 3d Ed., § 518 (416) and § 519.

Police Jury v. Britton, 15 Wall., 566.
The Mayor v. Ray, 19 Wall., 468.
Scipio v. Wright, 101 U. S. 605.

In this last case of Scipio v. Wright, in the opinion delivered by Mr. Justice Strong, on page 667, the Court say: "The plaintiff brought suit upon twenty-five bonds, or rather notes, each for the sum of $1,000, which, as he alleged, had been issued by the township in pursuance of and under authority of law. Of course it was incumbent upon him to prove that the town was authorized to create the instruments, and to dispose of them in the manner in which disposition of them was made."

4. But as the bonds were all subsequently offered in evidence to the jury (record, page 38) we cannot see how the plaintiff could be injured by or can now be allowed to complain of the ruling of the Court so excepted to.

Webber v. Donnelly, 33 Mich., 460.
Lenox v. Fuller, 39 Mich., 268.
Greenleaf v. Birth, 5 Peters', 132.
R. R. Co. v. Howard, 13 How., 307.

The foregoing points are also applicable to most of the other exceptions taken to the rulings of the Court in regard to the admission of evidence.

5. The 2d, 3d, and 4th exceptions, pages 39 and 40 of record, are to the rulings of the Court admitting evidence to show the actual transac-

tions at the Board meeting, and that Samuel Chipman, whose name is signed to the record of the proceedings of the Township Board, offered in evidence by the plaintiff (page 38 of record) was not in fact one of the Board, but that C. D. Bennet was the one competent to act; Samuel W. Platt, the other oldest Justice, appearing by the record of the proceedings to have been present but not signing the proceedings (page 37). By the Michigan statute the two Justices whose terms of office would soonest expire, constituted, with the Supervisor and Clerk, the Township Board.

1 Comp. Laws Mich., 1871, § 706.

This was a matter set up in the notice of defense attached to defendant's plea (page 32). It had already appeared in evidence by the testimony of John Rutherford and Samuel P. Williams, the plaintiff, (pages 38 and 39 of record) that all but six of the bonds in suit were held by Samuel Kline and William Connor, and were in plaintiff's hands only for collection, and also that said Kline and Connor were both present when the bonds were issued, on the very day the record in question bears date, and defendant's offer of the testimony proposed also to show that Kline and Connor both knew at the time the fact of Chipman's disqualification to act; and this is fully supported by the testimony of Eaton and Rutherford (pages 40 to 43 inclusive) which shows that Kline and Connor were both present at the meeting soliciting the issuing of the bonds, and both lived in said township of Nottawa, and that Connor was notified by Eaton

at the time that Chipman was not a member of the Township Board, and also that he was not entitled to the bonds.

But even if the evidence were irrelevant or immaterial, its admission, with the qualifying words of the Court at the time, could not have prejudiced the plaintiff, as the Judge wholly ignored and disregarded it in his subsequent charge to the jury (page 50 of record), saying to them that "the proceedings which were had authorized the issuance of bonds by the township of Nottawa to aid in the construction of the Grand Rapids and Indiana Railroad."

See 15 Pet., 132, and 13 How., 307.

6. The 5th, 6th, and 7th exceptions, found on pages 40, 41, and 42 of record, all relate to the admissibility of evidence relative to transactions connected with the issuing of the bonds, and in which said Kline and Connor either participated or were cognizant of, and the bond given by them at the time, as appears on pages 42 and 43 of record, shows on its face an admission by them that S. W. Platt was a Justice and one of the Board of that township, that they themselves were each residents of said Nottawa, and that they knew the issue of the bonds was illegal. The evidence all related also to the special matters of defense set up in defendant's notice. But see also the charge of the Court and the authorities above quoted.

III.

The 8th exception, on page 46, is to the ruling of the Court admitting evidence to show that the railroad through the township of Nottawa was not completed as required by law to authorize the issuing of the bonds on the 17th day of January, 1867, the time when the bonds were actually issued to Kline and Connor. As there were no recitals in the bonds purporting to show a compliance with the statute in this respect, and as the execution of the bonds had been denied by affidavit filed with the plea, and especially as most of the bonds were held by the original parties, it would seem to have been incumbent on the plaintiff to have made this proof affirmatively in the first instance; but certainly under these circumstances the defendant would be allowed to show that the statute in this respect was not complied with, and that the bonds were knowingly issued and received in violation of law—and in fact Kline and Connor had already admitted this in their bond of January 17, 1867, appearing on pages 42 and 43 of record. Where there are no recitals in the bonds, and no decision that the conditions precedent to a subscription or the gift, of authority to subscribe had been performed, the question is open.

1 Dill. on Corp., 3d Ed., § 524, and Note 1.
Coloma v. Eaves, 92 U. S. 484, 492.

2. The 9th, 10th, 11th, 12th, 13th, and 14th exceptions of plaintiff, found on pages 47, 48, 49, and 50 of the record, all relate to the admissi-

bility of evidence to show when the railroad was completed after the bonds were issued, or that it was completed in 1869 or 1870, and as to certain alleged arrangements of Kline and Connor with the Railroad Company in regard to these bonds, and as to how much the Railroad Company was owing them.

It will be seen by the record that the declaration avers the execution of all the bonds on the 17th day of January, 1867, that the bonds, with coupons attached, (page 36) all bear that date, that the record offered in evidence by the plaintiff of the alleged proceedings of the Township Board for the issue of the bonds (pages 37 and 38) has the same date; that the order of the Railroad Company, offered in evidence by the plaintiff, authorizing Kline and Connor to negotiate the bonds, is dated September 6, 1866, and that by the testimony of Connor (page 50) he handed the order for the bonds to Eaton, the Town Clerk, about the first week in September, 1866, and that Eaton then made the endorsement of preference on them which Connor had previously testified to, and by the bond of Kline and Connor (page 42 and 43) it is admitted that the bonds were issued to them on the 17th day of January, 1867, and such is the testimony of Rutherford and Eaton (pages 38 to 43 inclusive). It would seem then by the plaintiff's own evidence, and the written admission under seal of Kline and Connor, independent of the evidence on the part of the defendant, that the bonds were issued on the 17th day of January, 1867, and the plaintiff's declaration proceeds on that theory and so avers the fact to be, that they were all executed on that day, and claims inter-

est from that date, and delivery is included in the execution of an instrument.

Freeman v. Ellison, 37 Mich., 459.

3. But if the road was not completed as required by the statute, there was no authority to issue or deliver the bonds, and it was immaterial whether in 1867 or 1870 the railroad, as the plaintiff proposed to show (page 49), was completed, which was in fact all that was claimed on the part of the plaintiff. However, in fact, the plaintiff was subsequently allowed to show, and did prove this very fact by the testimony of William Connor on page 49, where he says that the road was completed and the cars running on it in June, 1870, and this was not denied or attempted to be contradicted on the part of the defendant.

Whether Kline and Connor advanced money for the Railroad Company, or for work, labor, or materials on the road, or whether the Company was then or afterwards indebted to them for such work, labor and materials was wholly immaterial. These facts would not legalize the issue of the bonds at the time they were issued, and the said Kline and Connor could not in this way build up any equities in their favor in this suit as against the defendant. They were cognizant of the facts and the law, and knew that the Township Board had no authority in the matter outside of and not in compliance with the law.

4. If the power to issue the bonds in aid of the railroad did not exist when the bonds were

issued it certainly, as to Kline and Connor, was a good defense to the bonds. "The power when it has been conferred to aid or engage in extra municipal enterprises being extraordinary in its nature and burdensome to the citizen must (at least between all persons except bona fide holders of the securities) be strictly pursued according to the terms and conditions of the grant conferring it."

1 Dill. on Municip. Corp., 3d Ed., §§ 163, (108), 519, 531, (419).
Police Jury v. Britton, 15 Wall., 566.
Marsh v. Fulton County, 10 Wall., 676.
Aspinwall v. Daviess County, 22 How., 364.
Coloma v. Eaves, 92 U. S., 484, 492.
Wells v. Supervisors, 102 U. S., 625.
Ogden v. Daviess County, 102 U. S., 634.

IV.

The four remaining exceptions of the plaintiff are to different portions of the charge of the Court, and are found on page 51 of the printed record. They all involve the question whether the bonds in this case were legally issued, if at the time they were issued the ties were not furnished and delivered on the line of the road, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road-crossings were not fully completed and ready for the iron within the limits of said township of Nottawa as required by said act of February 5, 1864.

So far as the first exception to the charge relates to the opinion of the Court expressed upon matters of fact and the weight of evidence, we refer to the opinion of this Court in Carver v. Jackson, 4 Pet., 80, in which Mr. Justice Storey says: "With the charge of the Court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this Court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration, as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury, in the exercise of their own judgment, choose to give them. They neither are, nor are they understood to be, binding upon them as the true and conclusive exposition of the evidence." See also this principle re-affirmed in Magniac v. Thompson, 7 Pet., 348, 390.

2. The portion of Section 4 of the act quoted in the charge of the Court, on page 51 of the record, would seem to be of itself conclusive as to the illegality of bonds issued before the road was thus completed.

The performance of all those acts made by the statute conditions precedent has been held necessary to authorize a recovery on a stock subscription to a Railroad Company.

Swartwout v. R. R. Co., 24 Mich., 389.

So also where bonds had been voted by a town in aid of a railway on condition that the

road should be completed and cars running to a certain place by a specified time.

Railroad Company v. Hartford, 58 Me., 23.

In Woods v. Lawrence County, 1 Black, 386, one point set up in the defense was that the bonds were disposed of by the Railroad Company for less than their par value, in violation of the statute authorizing the county to subscribe and issue bonds to the Company, and the Court (pages 94 and 95) rejected this defense on the ground that the plaintiff was a bona fide holder for value, apparently recognizing the defense as valid had the suit been between the original parties or brought by a person having notice.

See also Coloma v. Eaves, 92 U. S., 484, 492.

3. Where the legislation requires compliance with certain conditions before issuing the bonds the power cannot be rightfully exercised unless the condition precedent has been performed. As between the immediate parties, the municipality, and the Railroad Company, doubtless inquiry is open, and fully open, whether the condition on which the rightful exercise of the power depends has been complied with; and if the bonds are in the hands of the original party or holders with notice, an action to enforce the bonds may, if no estoppel exists, be successfully defended.

1 Dill. on Corp., 3d Ed., §§ 519, 531, (419).

We have seen by the printed record in this case that there are no recitals in these bonds to estop the defendant from setting up this defense even against a bona fide holder, and also that Kline and Connor, who hold all of the bonds and coupons in suit except those on which the plaintiff recovered judgment, were cognizant of all the facts, were the persons to whom the bonds were originally issued, and were themselves personally present, knowingly soliciting and urging the township officers to violate the law for their personal pecuniary benefit, and even gave their individual bond to those officers at the time, to induce them to violate the law, issue the bonds to themselves, in which bond they acknowledge the illegality, and agree to indemnify those officers against such illegal act. We submit that such conduct cannot legalize bonds thus issued, and that their individual bond was also against public policy. Nor could the Board in this way ratify or confirm its act, as it had not power to make such a contract, or prematurely to issue the bonds.

2 Daniel on Neg. Inst., p. 468–9, § 1,538.
Marsh v. Fulton County, 10 Wall, 683.

4. In Chambers County v. Clews, 21 Wall., 317, Mr. Justice Hunt, in delivering the opinion of the Court (page 321), says: "We have held many times, in relation to bonds of this character, that where the persons appointed by law to certify that the preliminary requisites have been complied with, do so certify, that their certificate is conclusive in favor of the holder, who, on the

the town was authorized upon a vote of approval by the voters of the town to appropriate money to aid in the construction of a certain railroad, to be paid to said Railroad Company as soon as the track of said road shall have been located and constructed through said town.

The town voted the appropriation provided the Company would run its road through the town, and issued the bonds after the Company had given notice of its acceptance, and the Court held, amongst other points decided in the case, that under the statute the town could not make an appropriation or donation in aid of the Company until its road was constructed through the town, and that the bonds so issued were void. This point in the case, we believe, is not affected by the subsequent decision in Fairfield v. Galatin County, 100 U. S., 47.

In Harshman v. Bates County, 92 U. S., 569, and Bates County v. Winter, 97 U. S., 83, it was held where a subscription for the stock of a Railroad Company had been duly authorized by the requisite number of qualified voters of a township, and the Company, before the subscription was actually made, became consolidated with another Company, thereby forming a third Company, that the County Court was not empowered to subscribe on behalf of the township for stock of the new Company and issue bonds in payment therefor, and the action on the bonds and coupons which had been so issued was not sustained.

6. If the statute of Michigan therefore is relied upon to support these bonds, the facts show that its provisions had not been complied with when the bonds were issued, and that they

were issued illegally, and the plaintiff, as representing Kline and Connor, and they the Railroad Company, in thus knowingly procuring them to be so issued, is not entitled to recover on those bonds so held by Kline and Connor.

But it is also averred in the plaintiff's declaration (pages 3 and 4 of the printed record) that the electors of the said township of Nottawa on the 11th day of August, 1866, determined to aid in the construction of said railroad in manner, form, and amount as was set forth in the request for calling a meeting of said electors for that purpose, and that each of the questions submitted were determined in the affirmative, and that on or before the 17th day of January, 1867, the Township Board directed the Supervisor and Clerk to execute the bonds of said township to the amount of $15,000. A copy of said request and notice for said meeting, and of the proceedings, will be found in the printed record, pages 43 to 46 inclusive. It will be seen that the request (page 45) on which the vote is claimed to have been taken, proposes "said fourteen or fifteen thousand dollars to be raised by tax on the general list of said township, and if bonds are issued they shall draw seven per cent. per annum, said bonds to be drawn payable as follows, viz: Four thousand dollars payable one year from the date thereof; four thousand dollars payable two years from the date thereof; four thousand dollars payable three years from the date thereof, and the remainder payable four years from the date thereof."

We submit that such a proposition, even with what precedes it in the request, is too vague, ambiguous and uncertain to submit to

the voters of a township, or to permit an intelligent vote upon. Is it a proposition to raise $14,000 or $15,000, to raise it by tax on the general list of the township, or by the issuing of the township bonds therefor? What does an affirmative vote mean on such a proposition? Did it vote to raise the proposed additional $1,000, or only to issue bonds as proposed for the $14,000 claimed to have been previously voted but which had been prohibited to be issued until the road should be completed to Kalamazoo? How could a voter vote for one proposition and against the other on one ballot in the form the statute prescribed? A copy of one of the bonds only is given (page 36 of record) but the declaration (pages 4 to 28) gives the number, date, amount, and time of payment of each bond, and from that we insist, as was urged in the court below, and is incidentally noticed in the charge of the Court on page 52, that none of the bonds conform to the proposition contained in the request so voted on in regard to their time of issue and time of payment; and the record of the proceedings of the special meeting of the Township Board of January 17, 1867, offered in evidence by the plaintiff, and found on pages 37 and 38, shows that the resolution then and there passed for the issuing of the bonds disregarded the said vote, if it can be called a vote, to issue the bonds, both in regard to the time of issue and time of payment. The propositions voted on as contained in the request for the meeting was for the bonds to issue "whenever the ties shall be furnished and delivered on the line of the railroad, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road-cross-

ings shall be fully completed and ready for the iron in said township of Nottawa," following the terms of the statute.

Bonds 47 to 86 inclusive, amounting to $4,000, are, as directed in said resolution, made payable January 1, 1868, being less than one year. No bond is authorized by the vote to be issued payable before one year from the date.

Bonds 16 to 46 inclusive, and 87 to 91 inclusive, amounting to $4,100, are made payable Jan. 1, 1869, in direct violation of the so called vote, which specified two years from the date.

Bonds 4, 5, and 6, and from 7 to 15 inclusive, amounting to $3,900, are made payable January 1, 1870, being less than three years from their date, as proposed and ordered.

Bonds 1, 2, and 3, being each for $1,000, and in all amounting to $3,000, are made payable January 1, 1871, or less than four years from their date, as proposed and ordered.

The face of the bonds so issued in the aggregate, it will be seen, amount to $15,000, although the original request started out with the proposition to consider first whether the freeholders of the township would vote an additional $1,000, and, second, whether they would issue bonds as proposed for the $14,000 claimed to have been previously voted (page 45 of record) but the time limited for issuing of which it was desired to change, and by the statute (Sec. 2) the questions so submitted to the electors were to be those contained in the call for the meeting, and those who vote in the affirmative were required to vote a ballot on which was written or printed "Aid for railroad—yes," and those who voted in the negative on a ballot on which was written or

printed "Aid for railroad—no." The record (page 44) shows only one general vote on the two propositions submitted in the request or call for the meeting, both propositions being voted on, if at all, together on one ballot in the form prescribed, but no separate vote on each proposition. We submit that both propositions in the request could not be so voted on together, but each was required to be voted on separately and to be separately canvassed and declared, and this not having been done the vote was ineffectual and nugatory, and never authorized the issuing of the bonds.

2 Daniel on Neg. Inst., p. 465, § 1,535.
Railroad Company v. Tazewell County, 22 Ill., 156.

V.

We have heretofore been considering this question on the theory contended for by the plaintiff, that the Michigan statute of February 5, 1864, under which it is averred the bonds were issued, was constitutional and valid.

But as the bonds in dispute are in the hands of Kline and Connor, the original parties who procured their issue, and as they received them with a full knowledge of all the circumstances, and on the order of the Railroad Company for a past consideration, no question arises under the law of commercial paper, as to the rights of a bona fide purchaser before maturity for a valuable consideration paid, and without notice of

the facts constituting a defense to the same, and all legal defenses are open to the defendant, and we submit that the plaintiff, as representing Kline and Connor, is bound by the decisions of the Supreme Court of Michigan, declaring in effect that all statutes of the State, such as the one under consideration, under which these bonds are claimed to have been issued, are unconstitutional and void.

People v. Salem, 20 Mich., 452.
People v. State Treas. 23 Mich., 499.
Thomas v. Port Huron, 27 Mich., 320.

We believe the Supreme Court of Michigan has never given any other construction to such statutes in that State passed since the State Constitution of 1850 took effect, and this Court, while refusing to be bound by that construction in a case where the bonds issued under the State statute, before the first decision of the State Court was made, were in the hands of a *bona fide* holder, (Pine Grove v. Talcott, 19 Wall., 666) holding that in that case the question belonged to the domain of general jurisprudence and involved commercial securities, yet we think it has never held that these decisions of the State Court would not be followed in a case like the one we are now considering.

In Township of Elmwood v. Marcy, 92 U. S., 289, this Court accepted and applied the decisions of the Supreme Court of Illinois, construing the statute under which the bonds in question were issued and held them invalid, although it is suggested in the dissenting opinion of Mr. Justice Strong (pages 298, 299) that the said decisions of

the Supreme Court of Illinois, which were so accepted and followed, had been made since the bonds were issued and differed from a prior ruling of the same Court. See also:

Fairfield v. Gallatin Co., 100 U. S., 47.
Douglass v. Pike Co., 101 U. S., 677 687.
Seybert v. City of Pittsburgh, 1 Wall., 272.

In Scipio v. Wright, 101 U. S., 665, under a statute of New York authorizing towns to subscribe to the capital stock of railroad companies and issue bonds for the purpose of borrowing money therefor and prescribing the manner in which the power conferred should be exercised, certain bonds were issued and instead of borrowing money with them and paying it over to the railroad company, certain of the bonds were exchanged with the company for shares of stock of the company, and this Court, following the decisions of the State of New York construing such statute, though apparently questioning its soundness originally, held that the bonds so exchanged were illegal and that no recovery could be had thereon by one who took them with notice.

In the case now pending in this Court the rights of no *bona fide* purchaser are involved, nor is the holder of the bonds in question a citizen of another State or a foreigner, (Daniel on Neg. Inst., p. 459, §1,526), and it is submitted that the plaintiff's allegations of error are not sustained.

CHARLES UPSON,
Attorney and of Counsel for Def't.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 149.

JOHN MORRISON, PLAINTIFF IN ERROR,

vs.

SAMUEL STALNAKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED DECEMBER 31, 1878.

14 — 213

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1 To the honorable Chief-Justice and associate justices of the Supreme Court of the United States:

The petition of John Morrison respectfully sheweth:

That at the October term, A. D. 1877, of the supreme court of the State of Nebraska, held at Lincoln in said State, on the 19th day of December, 1877, a judgment was rendered by said court against your petitioner, John Morrison, in a certain suit then pending in said supreme court of the State of Nebraska, wherein Samuel Stalnaker was plaintiff in error and your petitioner was defendant in error.

2nd. That said judgment is final, and that said supreme court is the highest court in said State of Nebraska in which a decision could have been or can be had in said suit.

3d. That in the rendition of said judgment by the said supreme court against your petitioner there was drawn in question the construction of certain statutes of the United States, under and by virtue of which, and a patent issued in pursuance thereof by the proper officers and authority of the United States, your petitioner claimed right and title to certain lands; and that the decision of the said supreme court

2 of the State of Nebraska was against the right and title so claimed by your petitioner and erroneous. All of which is shown by the record and proceedings of and in said suit a transcript of which is herewith submitted.

Your petitioner therefore prays that a writ of error removing the record and proceedings in said suit, with all things concerning the same, to the Supreme Court of the United States, and the proper citation to be directed to the said Samuel Stalnaker, may be allowed and issued, and that the said decision may be revoked.

WILLIS DRUMMOND AND
ROBERT H. BRADFORD,
Attorneys for John Morrison.

Writ of error allowed by

SAM. F. MILLER,
Judge Sup. Court U. S.

DEC. 1, 1878.

3 Supreme court of the State of Nebraska, October term, 1877.

Be it remembered that at a term of the supreme court of the State of Nebraska, begun and held at the capitol in the city of Lincoln, on the second day of October, 1877, there being present Hon. George B. Lake, chief justice; Hon. Daniel Gantt, associate justice; Hon. Samuel Maxwell, associate justice; George H. Roberts, attorney general; Guy, A. Brown, clerk & reporter, the following proceedings were had and done in a certain cause in said court wherein Samuel Stalnaker was plaintiff in error and John Morrison was defendant in error.

And now heretofore, to wit, on the 5th day of May, 1877, the following petition in error, precipe, and transcript in said cause was filed in the office of the clerk of said court.

4 *Petition in error.*

In the supreme court of the State of Nebraska.

SAMUEL STALNAKER, PLAINTIFF
against
JOHN MORRISON, DEFENDANT.

Samuel Stalnaker, plaintiff, complains of John Morrison, defendant,

for that the said John Morrison at the October, 1876, term of the district court of the second judicial district of the State of Nebraska, in and for the county of Lancaster, recovered a judgment by the consideration and final determination of the said court against said plaintiff in a certain action then pending in said court wherein the said John Morrison was plaintiff and this plaintiff, Samuel Stalnaker, was defendant, a copy of the record and all proceedings in which case, duly certified, is hereunto attached, marked "A," and made a part of this petition.

And the said Samuel Stalnaker avers that there is error in the said record and procedings in this, to wit:

I. The said court erred on the trial of the said cause in finding the issues joined therein in favor of the plaintiff and against the defendant therein.

5 II. The said court erred on the trial of the said cause in rendering judgment therein in favor of the plaintiff and against the defendant therein.

III. The said court erred in overruling the motion of the defendant therein for a new trial.

IV. That the sard judgment was given for the said John Morrison when it ought to have been given for the said Samuel Stalnaker according to the law of 'he land.

The said Samuel Stalnaker, plaintiff, therefore prays that the said judgment may be reversed and the said plaintiff be restored to all things he has lost by reason thereof.

COBB, MARQUETT & MOORE,
Attorneys for the Plaintiff in Error.

(Endorsed:) 409. Supreme court State of Nebraska. Samuel Stalnaker vs. John Morrison. Petition in error. Filed May 5, 1877. Guy A. Brown, clerk, by H. H. Wheeler, dep't' cl'k.

6 *Bill of exceptions.*

In the district court of the second judicial district of the State of Nebraska, in and for the county of Lancaster.

JOHN MORRISON, PLAINTIFF,
vs.
SAMUEL STALMAKER, DEFENDANT.

Be it remembered that on the trial of this cause in the district court of the second judicial district, of the State of Nebraska, held in and for the county of Lancaster, before the court at the October term, A. D. 1876, the said plaintiff to maintain the issues on his part offered the following testimony, which is all the testimony offered by him in chief:

7 *Ex.*—Plaintiff's counsel offers in evidence a patent from the U. S. to John Morrison for the land in question marked Exhibit A.

Objected to as incompetent, immaterial, and irrelevant.

Overruled, and defendant excepts.

EXHIBIT A.

The United States of America to all to whom these presents shall come, greeting:

Certificate No. 3038.

Whereas John Morrison, of Cass County, Nebraska, has deposited in the General Land Office of the United States a certificate of the register of the land office of Lincoln, Nebraska, whereby it appears that full payment has been made by the said John Morrison to the provisions of the act of Congress of the 24th April, 1820, entitled "An act making further provision for the sale of the public lands" for the north half of the northwest quarter of section eighteen, in township eleven, north of range nine east, in the district of lands subject to sale at Lincoln, Nebraska, containing sixty-eight acres and seventy-hundredths of an acre, according to the official plot of the survey of the said lands returned to the General Land Office by the surveyor-general, which said tract
8 has been purchased by the said John Morrison:

Now know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John Morrison and to his heirs the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said John Morrison and to his heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

By the President.

U. S. GRANT,

[SEAL.] By S. D. WILLIAMSON,
Secretary.

C. B. BOYNTON,
Recorder of the General Land Office.

Recorded vol 4, page 364.

The following appeared on the back of this patent:
9 John Morrison, Cass County, R. & R. 3038. State of Nebraska, Cass County, ss. Filed for record June 13, 1873, at 2 p. m. Recorded in book R of deeds on page 271. D. W. McKemion, co. clerk, Cass County, Nebraska. Fees $1.00 paid.

Offers in evidence notice to leave, marked Exhibit B.
Objected to as incompetent, immaterial and irrelevant.
Overruled and defendant excepts.

EXHIBIT B.—*Legal notice.*

LINCOLN, NEBRASKA, *August 22nd*, 1873.

To SAMUEL STALNAKER.

SIR: You are hereby notified to leave the following premises, to wit: The north half (N. ½) of the northwest quarter (N. W. ¼) of section eigh-

teen (18), in township eleven (11) north, range nine (9) east 6th p. m.' Cass County, State of Nebraska, within three days, or I will commence an action to eject you from the same.

Yours,

JOHN MORRISON.

10 The following appeared on the back of this exhibit:

LINCOLN, NEB., *Aug.* 22, 1873.

I hereby authorize and appoint N. A. Cornish to serve the within notice.

EZRA TULLIS,
Justice of the Peace.

STATE OF NEBRASKA,
Lancaster County, ss:

N. A. Cornish, being duly sworn as the law requires, says, that he served the within notice on the within named Samuel Stalnaker by delivering to him on the 22nd day of Aug., 1873, a true and complete copy of this notice.

N. A. CORNISH.

Subscribed in my presence sworn to before me this 22' day of Aug., 1873.

EZRA TULLIS, *J. P.*

JOHN MORRISON, plaintiff, testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Mr. Morrison, you are the plaintiff in this case?

A. Yes, sir.

Q. You may state, Mr. Morrison—describe to the court the condition of these premises at the time you were there and obtained your
11 patent in 1873. Tell him what kind of a tract it was.

A. Well, it was a piece of land improved; the first I was near it.

Q. State what the improvements were.

A. There was a frame house on it at the time I was there, and a well and some trees—a grove of trees—and I told a man when I went down that I wanted to let out some breaking, and he told me he diden't think there was much breaking on it to do.

Q. How much breaking or improved land was there on the premises?

A. He told me that it was all broke but fourteen acres.

By Mr. MARQUETT:

Q. Who told you that?

A. The defendant told me that it was all broke but fourteen acres.

By Mr. LAMB:

Q. State to the court what was the reasonable value of the rental of that land per acre.

A. I have inquired when I got my patent, and found that it was from two to three dollars per acre.

(Objected on the grounds that the counsel has not laid sufficient foundation for the question as to the value of the rental of the land.)

Q. How many acres have you in this tract?

A. My patent says 68.

(Objected to.)

Q. Don't say what the patent says. If you know say so. We don't want you to state the contents of the patent, you know.

12 A. Sixty-eight acres and some hundredths of chains.

By the COURT:

Q. It is not a whole 80, then?

A. No, sir. It is 68 and some fraction.

Cross-examination. Questions by Mr. MARQUETTE:

Q. What improvements did you say were on this land?

A. It was all improved and broke, sir, but 14 acres.

Q. How do you know?

A. A man, the defendant, told me when I went to look at it.

Q. There was a house on it, was there?

A. Yes, sir; a frame house and some trees.

Q. There was some trees planted on it?

A. Yes, sir.

Q. That is all.

Excused.

HIRAM BOONE testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Hiram Boone, you are a resident of this county?

A. I am, sir.

Q. You are a farmer?

A. I am, sir.

13 Q. And have lived here how long?

A. Growing on nine years.

Q. Growing on nine years?

A. Yes, sir.

Q. Have you been engaged in farming during that time?

A. Principally.

Q. You are acquainted with this land?

A. I have been on the land; yes, sir.

Q. Were you on there in 1873?

A. 1872.

Q. Do you know of the improvements on the land?

A. Yes, sir; pretty much. I didn't go all over the land. There was a house and well and some trees there.

Q. You heard Mr. Morrison's statement?

A. Yes, sir.

Q. You may state, with the improvements and the house, what was a reasonable rental value of that land.

(Objected to as incompetent; has not laid sufficient foundation for the question.)

Q. Do you know what the rental value of lands in this county is?

A. I have rented lands for $2.50 and $3.00 an acre.

Q. What in your judgment would be the reasonable rental value for this land per acre per annum since 1873?

A. You might say $2.50.

Cross-examination. Questions by Mr. MARQUETT:

14 Q. In the year 1873 would you take it as late as the 10th of May and give $3.00 an acre for it for that year?

A. I didn't say $3.00 an acre; I said $2.50.

Q. Would you take it at $2.50 that late day?

A. It would depend upon circumstances.

Q. Would you take it at $2.50 an acre as late as the 10th day of May?

A. I have rented land after that and paid a higher price than that.

Q. That you consider a low price?

A. I consider it a reasonable price.

Q. For the year 1873, commencing at the 10th of May, what was it worth per acre for that year?

A. When I said $2.50 I took in consideration all the years right along.

Q. All the years?

A. Yes, sir.

Q. Well, what was it worth for that year, for 1873; what was it worth for that year alone; a dollar an acre for that year, or how much?

A. There was some little circumstances connected with it.

Q. Well, take the circumstances, and take it at that late day in the year, how much was it worth?

(Objected to.)

Q. Commencing on the 10th of May, 1873, how much was it worth for that year?

A. If the ground was plowed and put in corn it was worth $2.00 an acre.

Q. If the ground was plowed and everything fixed?

15 A. No, sir.

Q. Do you know whether it was plowed?

A. Yes, sir.

Q. Who plowed it?

A. I couldn't tell you.

Q. You know it was plowed at that time?

A. Yes, sir.

Q. The plowing is worth something, is it not?

A. Yes, sir; I suppose it is. I paid a dollar per acre for plowing.

Q. You say it was worth for all the years $2.50 an acre?

A. Yes, sir; that is what I put it at.

Q. Now, how much was it worth for the year 1874 per acre, for the year 1874; that was the year the grasshoppers came, wasn't it?

A. I don't think that you ought to take that into consideration.

Q. No. How much for the year?

A. Three dollars per acre.

Q. How much was it worth for 1875? The grasshoppers didn't come that year. How much was it worth for that year?

No answer.

Can you tell me how much it was worth for that year; for the year 1875?

No answer.

You don't know how much it was worth?

A. I don't know what that land was worth. I know what other land was worth; I know what I paid.

Q. You don't know how much that land was worth per acre for that year?

16 A. Well, say $2.50.

Q. Then it was worth $2.50 in 1873, and $3.00 in 1874, and $2.50 again in 1875?

A. Yes, sir.

Q. Well, how came it to be worth fifty cents more in 1874?

A. Because our lands rented at about that rate.

Excused.

E. W. RHYKERK testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Mr. Rhykerk, you reside in this county?
A. Yes, sir.
Q. And are a farmer?
A. Yes, sir.
Q. And have lived here how long?
A. I have been here about seven years.
Q. And are you acquainted with the lands in question in this suit?
A. Yes, sir.
Q. You have been there?
A. Yes, sir.
Q. You have seen the improvements that were there?
A. I did.
Q. You were there in 1872 or '3?
A. I was; yes, sir.
Q. Do you know something of the rental value of lands in this county?

17 A. Well, for this year and three years ago I do. I have been away for three years.

Q. Did you at that time?
A. Yes, sir.
Q. What was the rental value of this land for the year 1873?
A. I suppose that was about an average section of land up there—the same as all over the county. I paid $3.00 an acre that year for some, and some paid $2.00 and some $2.50. I did pay $4.00 for some.
Q. What was a fair rental value in 1873 for this identical piece?
A. I should judge about $2.50; it might $3.00, according to the plat.

By the COURT:

Q. You are speaking of that land?
A. Yes, sir.

By Mr. LAMB:

Q. When did you go away?
A. I went away in the spring of 1873 or '4.
Q. Was it '73 or '74?
A. '74.
Q. And what for that year was a fair rental value of that land?
A. I rented my place for $4.00 an acre.
Q. And what would be a fair rental value for this piece for the year 1874?
A. Well, I suppose it was worth about the same.
Q. Have you been here this year?
A. Yes, sir.
Q. What would be a fair rental value for this year?
A. It would be from $2.00 to $2.50; I paid that.

18 Cross-examination. Questions by Mr. MARQUETT:

Q. Where do you reside; what part of the county?
A. The south part of the county, Buda Precinct, Lancaster County.
Q. Near where this land is?
A. No, sir.
Q. How far from this land do you reside?
A. It is about 25 or 30 miles, I guess.
Q. Did you ever live near this land?

A. No, sir; I never lived any nearer than I do now.
Q. You say that you were on this land?
A. Yes, sir.
Q. What were you doing down there?
(Objected to.)
A. I moved Mr. Morrison down there.
Q. That is the only time that you ever seen the land.
A. No, sir; I saw it once before—twice before—once or twice before.
Q. All you know about what land rents at down there is what land rents at down where you live 25 miles away?
A. No, sir; I rented a piece of land to a man that lives down there.
Q. All you know about the price of rent for lands down there is that you rented your land to a man that lives down there, is it?
A. Yes, sir.
Excused.
Plaintiff rests.

19 And then comes the defendant and offered the following testimony for the purpose of maintaining the issues on his part, which is all the testimony offered by the defendant-in-chief.

SAMUEL STALNAKER, def't, testified on part of defendant.

Questions by Mr. CHAPIN:

Q. Mr. Stalnaker, you are the defendant in this case?
A. Yes, sir.
Q. State where you reside.
A. I reside in Cass County.
Q. On this land in controversy?
A. Yes, sir.
Q. How long have you resided there?
A. About six years, or a little over six.
Q. State about when you moved on this land, if you can.
A. It was the first week in October, in 1870. I don't know how just the day; but it was the first week in October.
Q. What improvements were on the land when you went there?
(Plaintiff's counsel objects to all the testimony offered by the defendant under the second defense in the answer, for the reason that
20 it appears in the second defense that these lands were offered lands, and that the defendant failed to offer final proof of the payment for these lands at the land office within one year after filing his declaratory statement for the lands, and one year from the date of settlement and cultivation.
(Objection overruled and plaintiff excepts.)
A. There was about 25 acres broke, I guess, and a house 16x18 on the farm. When I went there there was 25 or 30 acres broke—I don't know which.
Q. State how you came in possession of the improvements.
A. I bou't the place of Brownley—Charley Brownley. It was a homestead.
Q. For how much?
A. 800 dollars.
Q. State what improvements you yourself have made upon the land since moving down there.
A. I have dug a basement, and dug a well, and put out about 4,000 or more forest trees, and there was about 14 acres to break on the piece.

I never measured it, but I think there was that to break up, and I put a 10x14 on the house as an addition to the house.

Q. Well state what you did upon the land for the next two years after you moved over there, for the next two seasons after moving there, in the way of cultivation.

(Same objection overruled and plaintiff excepts.)

21 A. Yes, sir; I did cultivate it, and raised wheat and corn and different kinds of grain on it.

Q. State whether you are a head of a family.

A. Yes, sir.

Q. Where are you from?

A. From Virginia.

Q. How much land had you at that time besides this—at the time you moved there?

A. I haden't any.

Q. State whether you have or have not contracted to sell or convey the title to this land.

A. No, sir; I have not.

Q. When did you file upon the land?

(Objected to, as the record is the best evidence.)

Question withdrawn.

A. I have the papers in my pocket. (Hands papers to the counsel.)

Q. You may state whether this is the original filing certificate received by you.

A. Yes, sir; that is the one I received.

Defendant's counsel offers in evidence pre-emption certificate No. 7159, dated February 16th, 1871, and the date of settlement January 18, 1871, marked Exhibit C.

EXHIBIT C.

LAND OFFICE AT LINCOLN, NEB.,
February 16th, 1871.

Mr. Samuel Stalnaker has this day paid two dollars—the register's and receiver's fees—to file a declaratory statement, the receipt
22 whereof is hereby acknowledged.

W. F. CHAPIN, *Receiver.*

No. 7159.

Mr. Samuel Stalnaker having paid the fees, has this day filed in this office his declaratory statement No. 7159, for N.^{2} of N.W.^{4} of section 18, township 11 N. of range 9 E., containing acres, settled upon 18' Jan., 1871, being offered.

S. McCONIGA, *Register.*

Q. State whether you have appeared at the United States land office to make proof of payment for this land.

(Objected to as incompetent and immaterial. Overruled and plaintiff excepts.)

A. I have the deed, and Chapin offered payment for me, which he diden't accept.

Q. State what you proved there.

(Objected to.)

Q. Well, state when it was, or about when it was.

A. It was about the last of May or the first of June. I don't know just which.

By Mr. LAMB:

Q. The last of May or the first of June?

A. Yes, sir.

Q. 1872?

A. Yes, sir; after the homestead was taken.

By Mr. CHAPIN:

23 Q. Well, subsequently what did you prove there at that time?

(Objected to as the proof then offered is the only competent evidence.

Whether anything was proved by the defendant is a legal conclusion dependant upon the evidence their offered, and that the evidence there offered in writing is the only competent evidence that can be considered.)

Sustained.

Witness excused for the present and

W. F. CHAPIN was sworn on part of defense.

Questions by Mr. MARQUETT:

Q. Mr. Chapin, do you know anything about this pre-emption right of Mr. Stalnaker? Were you in any way connected with it?

A. I acted as his attorney from the time he attempted to prove up along the last of Feb., 1872. I was with at the land office at that time.

Q. Were you *were* with him when it was attempted to be approved?

A. I was.

Q. Do you know what the position of the Land Office was?

(Objected to.)

Q. Do you know whether it was adverse or favorable?

(Objected to.)

A. Yes sir, I know what it was.

24 Q. Do you know where that decision is?

A. I know where I left it.

By the COURT:

Q. Have you looked after it and for it?

A. I have enquired for it of the Commissioner of the General Land Office.

By Mr. MARQUETT:

Q. Have you been able to find it?

A. I have not.

Q. You may state now whether there was any effort made to take an appeal by Mr. Stalnaker from the decision of the land office here; and if so, what it was.

(Objected to as incompetent.

First. Because there has no evidence been introduced that there was any decision ever rendered.

Second. That the officers here had no power to render any decision.

Third. If an appeal was taken, the appeal should be in writing, and the writing is the best evidence.)

Q. Do you know anything about an appeal being taken?

A. I do.

Q. Do you know whether the papers for that appeal was ever certified to by the General Land Commissioner or not?

(Objected to.)

Q. Do you know whether they were sent there?

A. Only that the Commissioner of the General Land Office
25 told me that they never reached him.

(Objected to as immaterial, irrelevant, and hearsay. Overruled and plaintiff excepts.)

Q. Did you ever make any inquiry as to whether they did reach there or not?

A. I did make inquiry.

(Objected to.)

Q. Did you ever make any inquiry whether the appeal had reached there or not?

(Objected to.)

By Mr. LAMB:

Q. Was that inquiry in writing?

A. Yes, sir.

Q. Did you ever make an inquiry?

A. I did make an inquiry.

Q. Did you ever get an answer to the inquiry?

A. Yes sir.

Q. Was that in writing?

A. It was.

Q. What has become of it?

A. It has been lost or mislaid along with some other of my papers. I don't know what has become of it.

Q. Have you made any search for it?

A. Yes sir, I have for several days.

Q. Where have you looked?

A. I have looked everywhere, where I generally keep my papers, at my house and at my office.

Q. Have you ever been able to find it?

A. No, sir.

By the COURT:

26 Q. What writing was it?

A. It was the correspondence from the Commissioner of the General Land Office.

By Mr. MARQUETT:

Q. Well, you may state what that was.

(Objected to as incompetent, immaterial, and irrelevant. Overruled and plaintiff excepts.)

Q. What was the answer to your inquiry with reference to this appeal?

(Same objection. Overruled and plaintiff excepts.)

A. It was that no appeal was ever filed in his office.

Q. When was this—how long after the appeal was taken?

A. It was shortly after—it was in the winter of 1872 and '73, and shortly before Mr. Morrison proved up, and it was after I had found the letter on file allowing him to prove it.

Q. What was the first intimation that the appeal was on file that you had?

A. That was the first intimation that I had when Mr. Morrison was ordered by the Commissioners to prove up.

Q. In this letter did he say anything about the decision or any other papers being on file?

A. No, sir. I simply asked the question whether he had received the appeal and considered it.

Q. This was, you say, in the winter?

27 A. Yes, sir, but I can't recollect the exact time, nor even the month that I got it.

Q. Do you know anything about whether Mr. Stalnaker had any notice or not?

(Objected to.)

By the COURT:

Q. Notice of what do you mean?

By Mr. MARQUETT:

A. Notice of the proving up.

(To the witness.)

You don't know anything about that?

A. I think I do.

(Objected to as incompetent, immaterial, and hearsay.)

Q. Do you anything about Mr. Morrison knew that he was contesting this as a pre-emption or not?

(Objected to as immaterial and irrelevant. Overruled and plaintiff excepts.)

A. Mr. Morrison knew it. He and I talked about it frequently.

Q. Was this evidence taken down in writing as to his right to prove up?

A. It was.

Q. Do you know what became of it.

A. I do not. I have been unable to find it.

By the COURT:

Q. Where should it be?

A. It should be in the U. S. office here, or in the Commissioner's office at Washington.

By Mr. MARQUETT:

Q. Have you ever looked or had any one look here to find it?

28 (Objected to.)

Q. Have you ever looked?

A. I have, and examined the office.

Q. Have you found it?

A. I couldn't find it at all.

Q. Is there any record kept of the sending away; any tally of it, or anything of that kind?

A. No, sir, unless the recorder or receiver should keep a copy of it. He should keep a copy-book.

Q. Have you ever looked to see if he has ever kept a record, showing this sending away?

(Objected to.)

Q. Did you ever make any inquiry to find out whether it was with the Commissioner of the General Land Office?

A. I did, in this way, because the application and the proof of appeal all goes together and the application——

(Objected to as incompetent, immaterial, and irrelevant. Overruled and plaintiff excepts.)

Q. You needn't state how it was done, but what was done.

A. The application to enter the land was endorsed on the back of it. The application wasn't approved in six months.

(Objected to.)

I didn't mean to say that that was the principal thing, but it is generally made at the time of the taking of the appeal. It was

29 to *right* on the back of it to the effect that their decision was appealed from, for the reason that the claimant was required to prove up.

Q. So no appeal would be in the General Commissioner's Land Office?
(Objected to.)

Q. In the inquiry that you made, was it in reference to the appeal or the papers?

A. It was for the appeal and papers.

Q. What did you say their answer was?

A. That they were not on file in his office.

Excused and

SAMUEL STALNAKER again took the stand.

Questions by Mr. MARQUETT:

Q. What time did you say that you went there to prove up?

A. It was the last of May or the first of June.

Q. Who were your witnesses?

A. A man by the name of Powell, I believe, and Mathews.

Q. Are they here now?

A. No, sir, Powell is dead, and Mathews, I guess, is in California or Oregon, I guess. I don't know where he has gone. He is not in the country at all.

Q. Do you recollect what Mr. Powell swore to in relation to your proving up, and your right to pre-empt this land?

(Objected to as incompetent, and that no proper foundation has
30 been laid for the introduction of secondary proof in the case. Overruled and plaintiff excepts.)

Q. You say that Mr. Powell is dead?

A. Yes, sir.

Q. You may now state what he testified to at the time he was sworn as a witness in your pre-emption case to prove up this land in question here.

(Objected to as incompetent, on the grounds that the counsel ought to prove the contents of this paper as near as they can. Overruled and plaintiff excepts.)

A. I had a little frame house 14x16, and a well, stable, and basement and about 55 acres—from 50 to 55 acres—broke on it, and there was about 14 acres that wasn't broke.

By the COURT:

Q. You are testifying to what Powell swore to on that trial?

A. Yes, sir, and he said there was some forest trees.

By Mr. MARQUETT:

Q. How many forest trees planted out?

A. About 4,000, and even more than that; there was about that many, if not more; and that he was on the place, and that he saw that many the day that he was on the place.

Q. What did he testify about how long he knew the place?

(Same objection. Overruled and plaintiff excepts.)

31 A. He was there in 1870—the day that he was on the place he was there threshing that day, and that he knew because he had seen the improvements that I put on the place.

Q. Did he say what you had done with these improvements—did he testify to the whole you had done?

(Same objection. Overruled and plaintiff excepts.)

A. I couldn't say whether he did or not, whether he said it was on the place when I went on it or whether it was on the place at the time I went to prove up.

By the COURT:

Q. You don't know whether he testified whether it was on the place when you went there, or whether you put them on?

A. Not all of it.

By Mr. MARQUETT:

Q. How did he testify?

A. That there was 25 or 30 acres broke up when I went there, and said it was on the place when I went there.

Q. Did he testify anything about how long you had been on the place?

A. Yes, sir.

Q. What did he say about that?

A. He testified about the time that I broke there.

Q. What did he say about that—what was the time?

A. I can't just tell the words that he said just now.

32 Q. Well, about the words?

A. I couldn't just say that, only that there wasn't much improvements there.

Q. What did he say about your being there? Did he know when you lived there?

A. Yes, sir.

Q. Did he say so?

A. Yes, sir; he said that I moved there on the place in October, 1870.

Q. What did that other party testify to? Do you recollect? What was his name?

A. It was Mathews.

Q. Did he testify about the same?

A. He testified about the same; just the same; they both testified the same.

Q. As to settlements?

A. As to settlements and improvements.

Q. Did anybody else ever have any improvements on there?

A. No one but Brownley, the man that I bought of.

Q. Did the plaintiff here, Mr. Morrison, ever have any improvements on there?

A. He came over one day with a load of lumber and hauled it on the place there, but he never put any buildings there.

Q. Who was with him when he came there?

(Plaintiff's counsel objects to all the testimony bearing on this point as immaterial and irrelevant. Overruled and plaintiff excepts.)

A. Those two gentlemen there (pointing), and there was another

33 man there—I don't know what his name was—that was a carpenter to build the house.

Q. They calculated to build it out of the lumber on the wagon?

A. That is what he said; that was the calculation.

Q. Was his family with him?

A. There was three women in the wagon with him, but whether they was this gentleman's family (pointing) or his, I couldn't tell; there was three women.

Q. Did you ever have any notice that he was going to prove up on this land?

(Objected to as incompetent, immaterial, and irrelevant. Overruled and plaintiff excepts.)

A. No, sir.

Cross-examination. Questions by Mr. LAMB:

Q. These witnesses swore to what you have stated the last of May or the first of June, at that time?

A. Yes, sir; it was Morrison had got his homestead; it the same month that Morrison homesteaded on it.

Q. It was the same month that Morrison homesteaded it?

A. Yes, sir.

Q. That is all. No more questions.

Excused.

34 JAMES MCMURRY testified on part of defense.

Questions by Mr. MARQUETT:

Q. Mr. McMurry, are you acquainted with the land in question here, the land that Mr. Stalnaker lives on?

A. I am.

Q. How long have you been acquainted with it?

A. Well, sir, for about 8 years; I live right by it.

Q. Where do you reside?

A. Right on the same section of this land that is now testified about.

Q. Do you know anything about the improvements made by Mr. Stalnaker on this land?

A. Well, I think I do; I have lived right by it ever since, here.

Q. Now you may state what improvements he made on this land.

(Objected to as immaterial and irrelevant. Overruled and plaintiff excepts.)

A. Well, sir, I think there was some 25 acres broke on the land, and a small house on the land, and some trees planted out when he came there, and he went to work and plowed; there was about 54 acres to plow, leaving 14 not broke; and he started an addition to his
35 house, I think about 14x16, and a small well and a small granary and some pig pens.

Q. When did he do this?

A. He done it when he first came there.

Q. What else did he do?

A. He broke some and put out some timber when he first came there.

Q. When was this addition put on his house?

A. I don't recollect.

Q. Wasn't it when he first went there?

A. I don't know when it was; I can't recollect.

Q. When did he put these trees out?

A. It was the next year, I think.

Q. How many did he put out?

A. About 4,000, I think, as near as I can recollect.

Q. Where does he reside now?

A. On that piece of land.

Q. When did he go there?

A. He came there about the first of October, 1870.

Q. What has he been doing with it?

A. He went to farming it, and trying to make a living on it as well as he could.

Q. Has he cultivated it all this time?

A. Yes, sir; all this time.

Excused.

36 JOHN MCMURRAY testified on part of defense.

Questions by Mr. MARQUETT:

Q. Are you acquainted with the parties to this suit?
A. I am acquainted with Mr. Stalnaker.
Q. How long have you been acquainted with him?
A. Nearly six years.
Q. Where do you reside?
A. I reside in about a quarter of a mile from this house.
Q. Do you know the land that he resides on?
A. Yes, sir.
Q. Do you know of him putting any improvements on that land?
A. Yes, sir.
Q. When? Do you recollect?
(Objected to as immaterial and irrelevant. Overruled and plaintiff excepts.)
A. At different times; I don't just recollect now what year. The was different years he has been there he has been improving it along. He plowed some in 1871. There is about 54 acres plowed now.
Q. Any trees planted there?
(Same objection. Overruled and plaintiff excepts.)
A. Yes, sir; there is about 4,000 trees—forest trees.
Q. And is there a well dug?
37 (Same objection. Overruled and plaintiff excepts.)
A. Yes, sir; there is a well dug.
Q. Do you know anything about his putting a house on there at that time?
(Same objection. Overruled and plaintiff excepts.)
A. He built an addition to the house that was there.
Q. Any other improvements?
(Same objection. Overruled and plaintiff excepts.)
A. He dug a cellar and put up a small granary, and a pig-pen, and such things.
Excused.

SAMUEL STALNAKER recalled.

Questions by Mr. CHAPIN:

Q. Shortly after you first appeared at the land office to make proof of your right to be on the land, did you produce other witnesses there?
(Objected to as leading, immaterial, and irrelevant. Overruled and plaintiff excepts.)
A. Yes, sir.
Q. Who were they?
A. There was John McMurray and Job McMurray and James McMurrray and Jacob Kenierer and John McWilliams.
Q. Are any of these witnesses present?
A. There is two of them here.
38 Q. You may state what you testified to before the register and receiver at the time that you tried to prove up.
(Objected as incompetent, as the record is the best evidence, and that the record has not yet been accounted for, and that no foundation has yet been laid for the introduction of this proof. Overruled and plaintiff excepts.)

By Mr. BURR to Mr. CHAPIN:

Q. Do you mean at the time the five or six witnesses were sworn, or at the time Mr. Powell was sworn?

By Mr. CHAPIN:

Q. I believe this man wasn't sworn but once.

By the COURT to the witness:

Q. You may go on and state what you testified to at that time.

A. I testified about that little building on the farm at that time, and that I dug a well, a cellar, and planted these forest trees—about 4,000; and I broke and put about 50 or 55 acres under cultivation.

Q. Did you testify anything in relation to your being the head of a family and about owning any other land?

A. Yes, sir; I testified that I was a head of a family and that I didn't own any other land.

Q. Did you testify in regard to your trying to convey this land?

A. No, sir; I never tried to convey it.

39 Q. The question was whether you were asked whether you had conveyed that land and whether you testified that you had not?

A. Yes, sir; I was asked that, and I testified that I hadn't made any contracts to convey it.

Q. Were you present when Mr. Morrison came down to make a settlement on that land?

(Objected to, as it had been gone over before.)

A. I wasn't right at the time when he first came there.

(Objected to. Sustained.)

Q. You were there before he left?

(Objected to.)

A. Yes, sir; I was there a few minutes before he left.

Q. You may state what he brought there.

(Objected to. Sustained.)

Q. Was there more than one load in all?

A. I believe they had part of two loads—but I believe it is likely they took it all away on one load; I believe had two teams with them when they went away.

Excused.

JOB MCMURRAY testified on part of defense.

Questions by Mr. CHAPIN:

Q. Did you testify before the register and receiver in relation to Mr. Stalnaker's settlement and cultivation of this land?

40 (Objected to as incompetent, as it does not appear when and at what time and under what circumstances this proof was called for or whether it was to prove up.)

By the COURT:

Q. State first what time it was, with respect to the time that he made his application.

A. I came here—I will have to tell the whole thing to get at it straight—I was west from here on the Republican River—I came here about the 12th of October, in the year 1872. I came to town here, and Mr. Stalnaker was here trying to fix up some of his papers, I can't tell now what, but he got us—I and Mr. McWilliams and somebody else, I don't know who—to go across the street, and there we fixed up some papers.

(Objected to.)

We went to the land-office on the street and then we were requested to go across the street to another office, I think where Mr. McConiga kept his office.

36 JOHN MCMURRAY testified on part of defense.

Questions by Mr. MARQUETT:

Q. Are you acquainted with the parties to this suit?
A. I am acquainted with Mr. Stalnaker.
Q. How long have you been acquainted with him?
A. Nearly six years.
Q. Where do you reside?
A. I reside in about a quarter of a mile from this house.
Q. Do you know the land that he resides on?
A. Yes, sir.
Q. Do you know of him putting any improvements on that land?
A. Yes, sir.
Q. When? Do you recollect?
(Objected to as immaterial and irrelevant. Overruled and plaintiff excepts.)
A. At different times; I don't just recollect now what year. The was different years he has been there he has been improving it along. He plowed some in 1871. There is about 54 acres plowed now.
Q. Any trees planted there?
(Same objection. Overruled and plaintiff excepts.)
A. Yes, sir; there is about 4,000 trees—forest trees.
Q. And is there a well dug?
37 (Same objection. Overruled and plaintiff excepts.)
A. Yes, sir; there is a well dug.
Q. Do you know anything about his putting a house on there at that time?
(Same objection. Overruled and plaintiff excepts.)
A. He built an addition to the house that was there.
Q. Any other improvements?
(Same objection. Overruled and plaintiff excepts.)
A. He dug a cellar and put up a small granary, and a pig-pen, and such things.
Excused.

SAMUEL STALNAKER recalled.

Questions by Mr. CHAPIN:

Q. Shortly after you first appeared at the land office to make proof of your right to be on the land, did you produce other witnesses there?
(Objected to as leading, immaterial, and irrelevant. Overruled and plaintiff excepts.)
A. Yes, sir.
Q. Who were they?
A. There was John McMurray and Job McMurray and James McMurrray and Jacob Kenierer and John McWilliams.
Q. Are any of these witnesses present?
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By Mr. BURR to Mr. CHAPIN:

Q. Do you mean at the time the five or six witnesses were sworn, or at the time Mr. Powell was sworn?

By Mr. CHAPIN:

Q. I believe this man wasn't sworn but once.

By the COURT to the witness:

Q. You may go on and state what you testified to at that time.

A. I testified about that little building on the farm at that time, and that I dug a well, a cellar, and planted these forest trees—about 4,000; and I broke and put about 50 or 55 acres under cultivation.

Q. Did you testify anything in relation to your being the head of a family and about owning any other land?

A. Yes, sir; I testified that I was a head of a family and that I didn't own any other land.

Q. Did you testify in regard to your trying to convey this land?

A. No, sir; I never tried to convey it.

39 Q. The question was whether you were asked whether you had conveyed that land and whether you testified that you had not?

A. Yes, sir; I was asked that, and I testified that I hadn't made any contracts to convey it.

Q. Were you present when Mr. Morrison came down to make a settlement on that land?

(Objected to, as it had been gone over before.)

A. I wasn't right at the time when he first came there.

(Objected to. Sustained.)

Q. You were there before he left?

(Objected to.)

A. Yes, sir; I was there a few minutes before he left.

Q. You may state what he brought there.

(Objected to. Sustained.)

Q. Was there more than one load in all?

A. I believe they had part of two loads—but I believe it is likely they took it all away on one load; I believe had two teams with them when they went away.

Excused.

JOB MCMURRAY testified on part of defense.

Questions by Mr. CHAPIN:

Q. Did you testify before the register and receiver in relation to Mr. Stalnaker's settlement and cultivation of this land?

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By the COURT:

Q. State first what time it was, with respect to the time that he made his application.

A. I came here—I will have to tell the whole thing to get at it straight—I was west from here on the Republican River—I came here about the 12th of October, in the year 1872. I came to town here, and Mr. Stalnaker was here trying to fix up some of his papers, I can't tell now what, but he got us—I and Mr. McWilliams and somebody else, I don't know who—to go across the street, and there we fixed up some papers.

(Objected to.)

We went to the land-office on the street and then we were requested to go across the street to another office, I think where Mr. McConiga kept his office.

By Mr. CHAPIN:

Q. That was in relation to some affidavits?

A. Yes, sir. That was for some affidavits.

By Mr. MARQUETT:

Q. Were you present at the time Mr. Morrison came down and went on this land?

A. I was there soon after he came there—an hour or so, I suppose.

41 Q. Do you know whether he had his family with him or not?

A. There was some women with him; I don't know whether they were his family or not. There was two or three women in the wagon that looked like they came there with the intention of stopping. I don't know whether they did or not. That was the talk anyway.

Q. Did Mr. Morrison ever live upon this land?

(Objected to as incompetent, immaterial, and irrelevant. Overruled and plaintiff excepts.)

A. I don't know anything about his living there.

Q. Do you know whether he made any improvements there or not?

A. Well, no, sir; he never made any.

Q. How near did you live to this land?

A. My land comes within a quarter of a mile of this land. I live within a half a mile of him.

Q. Do you know how far this land lies from the track of the Burlington and Missouri River Railroad Company?

(Objected to as immaterial and irrelevant. Overruled and plaintiff excepts.)

A. It is a little over three-quarters of a mile. It is not quite a mile.

Q. It is a little over ¾ of a mile from the track?

A. Yes, sir. I will correct that; it was a little over a mile.

By the COURT:

Q. A little over a mile from the track?

A. Yes, sir.

By Mr. MARQUETTE:

42 Q. It is a little over a mile from the track?

A. Yes, sir; it is a little over a mile from the track. I have been there hundreds of times.

Cross-examination. Questions by Mr. LAMB:

Q. Do you remember what day of the week you were there and Mr. Morrison was there?

A. I don't; I can't recollect. I can't tell you what day of the week it was.

Q. How did you go there—afoot?

A. I was in a wagon.

Q. From what point?

A. From my house.

Q. From your own place?

A. Yes, sir.

Q. Who was with you?

A. Mr. Wyman.

Q. Any one else?

A. No, sir.

Q. Who else did you see there besides Mr. Morrison?

A. Mr. Stalnaker and Mr. Morrison, and these two men (pointing,) and there was two women on the wagon, and a carpenter.

Q. Any one else?

A. Yes, sir; Mr. Smith.

43 Q. Any one else?

A. Yes, sir. I think there was another one that came by in a wagon.

Q. Did he stop too?

A. Yes, sir; he stopped there.

Q. How long had Stalnaker been there then?

A. About an hour.

Q. How long had you been there?

A. About an hour I came over. I had just got through threshing and started to get some hay for my horses, and we seen Mr. Stalnaker and Mr. Morrison, and we went up to them to see what the fuss was.

Q. Was anybody else there?

A. Yes, sir. Wyman took me over with his team, for he was stopping there to help me thresh.

Q. Was there anybody else there?

A. Yes, sir; another man came along. When we got there this carpenter said if there was any for him to get his things down to Greenwood he would take his things and go home to get out of the fuss.

Q. Who was the trouble between?

A. Mr. Stalnaker and Mr. Morrison.

Q. Did the carpenter say why he wanted to leave?

A. He said he didn't know anything it; that there was a fuss, and he came there to build the house and he supposed he could build it, but if there was going to be a fuss he wasn't going to stay there.

Q. Was Mr. Wyman's team hitched on the wagon?

44 A. One of them had a noose over it, but the team wouldn't pull it; and he said he didn't care about working him; and another one said he didn't.

Q. You hitched your team in there, didn't you?

A. No, sir.

Q. What team was hitched on?

A. One of the boys said his team wouldn't pull; and Mr. Wyman said his team wouldn't pull; and one of them said his team would; and that they would hitch on and pull the wagons off; but they didn't attack Mr. Morrison's wagon, I think.

Q. What did they haul off?

A. They hauled Mr. Morrison's things off.

Q. How did they hitch on? Did they attach a rope to it and haul it off?

A. I think they just hitched on to the wagon and hauled it off.

Q. Did you hear any conversation between Mr. Morrison and Mr. Stalnaker?

A. Yes, sir.

Q. State what was said at the time between the two that you recollect?

A. I can't recollect now.

Q. Well, what you can recollect.

A. I recollect that Mr. Morrison wanted his man to throw the lumber off; and the man didn't want to do it, and Mr. Morrison threw it off; and Mr. Stalnaker put it back on.

45 Q. What was said then with regard to the land, or with regard to building the house? Can you recollect anything that was said?

A. I can recollect what I said to Mr. Morrison.
Q. Just answer what Mr. Stalnaker and Mr. Morrison said.
A. I can't recollect.
Q. Was Mr. Stalnaker and Mr. Morrison present when you said anything?
A. Yes, sir.
Q. What did you say then?
A. I said to Mr. Morrison that if he couldn't do any better than they had done they had better compromise.
Q. What did Mr. Morrison say then?
A. Mr. Morrison said they couldn't compromise without a compromise to make.
Q. What did Mr. Stalnaker say?
A. He said there was no compromise to make.
Q. State all he said.
A. Mr. Stalnaker said that nobody could live in peace there, and that kind of hit me pretty hard for anybody to say that anybody couldn't live in peace there; and said I, "Mr. Morrison, he can live here on this land with you."
Q. What land; was that on the Stalnaker land?
A. I told him that he could live on that land along the railroad; and he said he did not want him there and he would not have him there.
Q. What did Mr. Stalnaker say?
46 A. He said a man couldn't live in peace there; and I said I thought it was a peaceable neighborhood.
Q. Did Stalnaker say anything to that?
A. No, sir; not that I recollect.
Q. Did Mr. Stalnaker say anything about the hauling of the way and off the land?
A. I don't know that he did.
Q. And that wagon was hauled off without his consent?
A. I think it was.
Q. Was there lumber in both wagons or only in one?
A. I think there was lumber in both of them.
Q. Did Mr. Morrison say he had come there to stay?
A. He said he came there with the intention of building a house there.
Q. What did Mr. Stalnaker say then?
A. He said he didn't want him to build a house there and he wouldn't let him build a house there; that he could go out on the railroad and build a house there; that that was his land.
Q. And he claimed he had no right to build a house there?
A. Yes, sir; Mr. Morrison said he would build up a house there; and Mr. Stalnaker said he would push down the pieces as fast as he could set them up.
Q. What was said to the carpenter?
A. I don't know that there was anything said to the carpenter; if there was, I don't know it.
47 Q. You heard nothing said whatever to the carpenter?
A. No, sir.
Q. Didn't some of them tell him to go?
A. I don't recollect.
Q. Did you see any one take hold of the carpenter?
A. Well, sir, I can't recollect for my life.
Q. Didn't you see him put in the wagon?
A. Did I see the carpenter put in the wagon?
Q. You wouldn't swear that he wasn't put in the wagon?

A. I wouldn't swear that he wasn't, because I didn't see it.
Q. Did you see Wymand put the carpenter's tools in the wagon?
A. No, sir; I did not.
Q. Did you see Morrison that night or any time at night?
A. No, sir; I never saw him after that; I can't say what time he left; I don't know anything about it.

Redirect exam.:

Q. Have you stated all this conversation?
A. No, sir; I have not told any more than a quarter of it; I have told them what I recollect of it.
Q. Did Mr. Morrison tell you he wasn't anyways afraid of them there?
A. I don't know whether he did or not.
Q. You don't recollect anything about that?
48 A. No, sir; I didn't pretend to memorize the conversation, and I don't recollect whether he used any such expression or not; I went away from there and left Mr. Smith talking to Mr. Stalnaker, and I don't know what the conversation was afterwards.

By Mr. LAMB:

Q. Is Mr. Smith here?
A. I don't know that he is.

By Mr. MARQUETT:

Q. Did anybody attempt to do any injury to Mr. Morrison while he was there?
A. No, sir; not while I was there. Not that I saw. After I went away I don't know what was done.
Q. Did Mr. Stalnaker say he didn't want him there because he wanted to build on the land?
A. No, sir; he said he didn't want him there because he calculated to keep that land himself.
Q. How long had Mr. Stalnaker been there before that?
A. I think it was not quite two years.
Excused.

J. B. MCDONNELL testified on part of plaintiff on rebuttal.

Questions by Mr. BURR:

Q. State what, if any, official position you occupy.
49 A. Register of the United States land office.
Q. In Lincoln, Nebraska?
A. Yes, sir.
Q. As such register have you the custody of the State tract books?
A. Yes, sir.
Q. You may turn to town 11, range 9 east, page 157.
(Witness does so.)
Q. Is that the tract book?
A. Yes, sir.
Q. Is that tract book of town 11, range 9 east, one of the records of the United States land office for Cass County, Neb.?
A. Yes, sir.
Q. You may state if that tract book shows whether that township 11, range 9 east of the 6th principal meridian was offered for sale.
A. Yes, sir; it does.
Defendant's counsel offers in evidence page 157.
(Objected to.)

Q. Does it state whether that land was offered for sale August 1st, 1869?

A. The proclamation is never here.

Q. You were subpœn'ed to produce a letter from the Commissioner of the General Land Office dated February 30, 1866?

A. Yes, sir.

Q. Have you got that?

A. No, sir.

Q. And one dated March 1st, 1867; December 17th, 1867; September 25, 1867?

A. Yes, sir.

Q. Have you got them?

A. No, sir.

50 Q. Have you examined the records of your office to find these letters?

A. Yes, sir.

Q. Are you the proper custodian of these letters?

A. Yes, sir; I presume I am.

Q. Have you examined the places where they are usually kept, and all other places?

A. Yes, sir; I have examined everywhere where I thought they would be likely to be—the places where they were likely to be.

Q. Have you been able to find them?

A. No, sir; I have been unable to find them, and I will state to the court that this land office has been through two fires, and there has been a good many land sharks through the land office, and it is not wonderful that these are not there.

Excused and was immediately called on part of the defense.

Questions by Mr. MARQUETT:

Q. Have you ever examined the records to see whether there was any record of an appeal taken by Mr. Stalnaker here for the land in question, the north half of the northwest quarter of section 18, town 11, range 9 east of the 6th principal meridian? Have you examined that?

A. I have examined the register of lands transmitted from the first of May, 1872, to the 25th of February, 1873; that is as far as I

51 have had time to examine. So far as I have gone I have found nothing.

Q. There is no record showing that they were transmitted?

A. No, sir; so far as I have gone there is not.

Excused.

W. F. CHAPIN recalled on part of defense.

Questions by Mr. MARQUETT:

Q. Mr. Chapin, do you know whether there was an appeal taken in this case?

(Objected to as gone over before.)

A. Yes, sir; there was an appeal taken.

Q. There was an appeal taken?

A. Yes, sir; and I don't believe that I was called upon to answer that before.

Q. Do you know whether the decision was favorable to Mr. Stalnaker or not?

A. It was not.

Q. Did you ever examine to see whether the appeal had been transmitted in company with the register & receiver?

A. I did.
Q. State what you done and what was done in your presence.
A. I examined the records of the land office with Mr. Summerlad to find whether the record had been transmitted, and I tried to find whether they were in the office, but I couldn't find the papers in the office.
52 Q. Did you ever have any conversation with Mr. Morrison as to how he claimed this land or by what right he claimed it?
(Objected to.)
Excused and again recalled.

Questions by Mr. MARQUETT:

Q. Mr. Chapin, at the time this transaction took place, or at the time Mr. Stalnaker attempted to prove up, who was in the land office; who was the officers?
(Objected to as immaterial and irrelevant; overruled and plaintiff excepts.)
A. Mr. Summerlad was the register.
Q. Who was the receiver?
A. Mr. Tucker.
Q. Did they have any clerks?
(Same objection. Overruled and plaintiff excepts.)
A. Yes, sir; Mr. Cannon.
Q. What did they do there?
(Same obj.)
Q. Mr. Chapin, did you ever have any conversation with reference to this matter with Mr. Morrison with reference to his contest with Mr. Stalnaker about entering that land; and if so, state what it was.
(Objected to.)
Q. I will put this question then to you. Did you ever have any conversation with the defendant with reference to his obtaining this
53 title; and if so, when and where?
A. The plaintiff you mean?
Q. I mean the plaintiff.
(Objected to as immaterial and irrelevant; overruled, and plaintiff excepts.)
A. There was nothing said about suppressing the papers. He told me that he had employed Mr. Cannon & Mr. Boyd, and it was their object to get the land for him in the first place, and that Mr. Cannon got a suit of clothes and something else. He didn't tell me anything about suppressing the papers or that he employed him to do anything of that kind.

By the COURT:

Q. Just to get the land?
A. Yes, sir; just to get the land.

By Mr. MARQUETT:

Q. Where was Mr. Cannon at that time?
A. He was a clerk in the land office during the whole time.
Q. What was his business in the land office?
A. What he did? Well, he was a general clerk. He did everything they could do except swear witnesses. He had access to everything that was in the office and made the papers generally in the office.
Q. What did he do, if anything, as to taking evidence in cases?
A. He did most of the taking of evidence himself, usually.

54 Cross-examination. Questions by Mr. LAMB:

Q. Is it not a fact that you said to Mr. Morrison, instead of Mr. Morrison to you, what you have stated?

A. No answer.

Q. Is it not a fact that you said to Mr. Morrison "You have got Mr. Cannon employed, haven't you"?

A. No, sir; he said that to me, and Mr. Morrison said he didn't want that to come out.

Q. Didn't you say to him, "You have got Mr. Cameron employed, haven't you?"

A. I think very likely I did. I knew it was so.

Q. And he told you at the time that Mr. Boyd was his attorney, didn't he?

A. He said he had employed Mr. Boyd and Mr. Cannon to get that land for him.

Q. You didn't ask Mr. Cannon to do it, did you?

A. No, sir.

Q. Mr. Cannon is your partner, isn't he?

A. Yes, sir.

Q. Didn't Mr. Cannon get clothes there? Didn't Mr. Cannon tell you that he got clothes there by Mr. Boyd's order?

A. I expect he did. He got clothes by Mr. Boyd's order.

Excused.

55 Defendant rests.

Plaintiff's rebutting.

C. C. BURR testified on part of plaintiff.

And then came the plaintiff and for the purpose of further maintaining the issues on his behalf offered the following rebutting testimony, which is all the testimony given on the part of the plaintiff in said case.

Questions by Mr. LAMB:

Q. Mr. Burr, you may state with regard to these letters that you ask Mr. McDowell about. Have you true copies of those letters?

A. I have a complete copy of one of them and a partial copy of the other.

Q. You may produce the one that you kept a full copy of.

A. I have a copy of a letter dated February 3d, 1866.

Excused.

Plaintiff's counsel offers in evidence a copy of the letter dated February 3d, 1866, March 1st, 1867, Exhibit D.

Date March 1st found on last page.

56 EXHIBIT D.

Received February 14th, 1866, at 12 o'clock a. m.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Feb'y 3d, 1866.

REGISTER AND RECEIVER,
Nebraska City, Nebraska:

GENTLEMEN: I am directed by the Secretary of the Interior to order a withdrawal of all the odd sections of land situated north of the grant

to the Atchison Branch of the Union Pacific Railroad and south of the Omaha Branch of said Union Pacific Railroad lying within the State of Kansas and Territory of Nebraska, for and on account of the Burlington and Missouri Railroad. This will embrace all the odd-numbered sections of land in your district, and you will therefore withhold from sale or location pre-emption or homestead entry all such sections until further notice.

You will acknowledge the date of the receipt of this order.

Respectfully, your obedient servant,

J. M. EDWARDS,
Commissioner.

57 JOHN MORRISON testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Mr. Morrison, you may state now to the court what conversation you had with Mr. Chapin. You heard Mr. Chapin's testimony?

A. Yes, sir.

Q. You may state what conversation you had with him about employing Mr. Boyd in this case.

A. I can't recollect of that. I had no conversation with him. He knew that Mr. Boyd was my attorney and got the homestead, I believe.

Q. Did you ever at any time tell him that you had Mr. Boyd and Mr. Cameron employed in your case?

A. No, sir; never.

Q. Or that Mr. Cameron had a suit of clothes; that you had furnished him a suit of clothes upon it?

58 A. Mr. Chapin told me himself that he got them. I never had anything to do with Mr. Cameron.

Q. Did you ever have him in your employ for any matter whatever?

A. Never.

Q. In what way was that suit of clothes bought?

A. They were bought by Mr. Boyd's order, and I charged them to Mr. Boyd.

Q. Now you may state what time you took this homestead entry.

A. I took it the 14th day of May, 1872.

Q. How soon did you go on the land?

A. I went down to do some breaking about three weeks after I got the homestead on it. I never knew that there was anybody breaking there or that there was anybody living there.

Q. When you took this homestead did you know that anybody was living on it?

A. No, sir.

59 Q. When did you first learn that anybody was living on it?

A. After I got down on the land. I told Mr. Scoggin that I was going to live there; *that I was going to live there;* that I was going to stop at his place before I went on it.

Q. Had you ever heard that anybody was living on it?

A. No, sir; not until I went there, and that was three weeks after I took the homestead.

Q. What did you pay for it under that head?

A. 200 dollars.

Q. And how much more when you commuted?

A. 172 dollars.

Q. Now state what you did towards settling and improving this land you took as a homestead.

A. Yes, sir; when I went down there I found there was a man living on it; my wife went with me to pick out a place for a house; she wanted to be as near some house as she could be. When she
60 heard there was a man living there she wanted to go back, but I told her if there was a man living there I would go and see him, and I left my wife at Mr. , and I went to see Mr. Stalnaker, and said I to him, "If there is any trouble between you and I, I will settle with you and go off the land, and you will never see me on the land again if you will pay me back the money I have paid out," and he threatened my life; he said I couldn't live 24 hours.

Q. What threats did he make to you?

A. He said I couldn't live 24 hours, and then I had to have him arrested.

Q. State what you next did about having the house built.

A. That was sometime in June or August. I got some lumber of Mr. Tuttle and Mr. Grant and built me a house 12x16, and got the house all ready to be put up, and got a man to tend my business in Iowa.

Q. Did you go on the land?

A. Yes, sir.

Q. State who went with you.

61 A. Mr. Rhykert went with one load and Mr. Pawell went with another load, and Mr. Boone took down my family and he got his wife to stay with my wife until the house was put up.

Q. State what you did when you went on the land.

A. We went on the land and my wife got dinner, and we was going to eat dinner when Mr. Stalnaker came there.

Q. What did he say?

A. He told us to go off the land as quick as we could, and I told him that I would not. Then the other parties came; then the first thing he done he hitched his team to the wagon they had and dragged the wagon across the plowed ground to the road, and another chap that had his team he hitched his team to the other wagon and drawed the lumber off, and I told him if he could show any title to the land he could have everything that I had there; but no, he wouldn't have anything to do with me; he made a boy drive his horses over and take the lumber and drag it off to the road, and Mr. Kesurd said he shouldn't take the
62 lumber off and I said so, and I told Mr. Stalnaker and the man that took the lumber off.

Q. Did they take it off without your consent?

A. Yes, sir; he and another man, I think Mr. Wyman.

Q. What did they do with the carpenter?

A. They took him off and sent him to Waverly and told him to go home.

Q. Did they take hold of him?

A. Yes, sir; they took hold of him and told him to go home. They took him to Waverly.

(Objected to.)

Q. What did they say to you about not letting you live there?

A. They took us off to the road and they couldn't do anything with us there, because we had a right to the road.

Q. What took place after that?

A. About dusk there was a good many came up on horseback.

Q. How many?

63 A. There was about a dozen anyway, and Mr. Wymand addressed me in particular.

Q. What did Mr. Wymand say at that time?

A. He said, "Old man, how do you like homesteading by this time?" and I told him that I didn't know, that I didn't expect to see so many friends come to see me; and he said that any damned son of a bitch that came there to interfere with his rights he would find Salt Creek his bed, and he jumped off his wagon and we had to move on, and they followed us.

Q. How far did they follow you?

A. I should think about two miles from Salt Creek.

Q. About what time was when they came there?

A. It was dark when they came there.

Q. State when you went to the land. For what purpose did you go there?

A. I went to live there and comply with the law.

64 Q. Were you prepared to comply with the law when you went?

A. Yes, sir.

Q. State whether you went there for that purpose.

A. Yes, sir.

Q. State why you did not live there and comply with the law.

A. Because I was dragged off.

Q. State whether any threats were made by him or any other person.

A. Yes, sir; there was plenty of them.

Q. State whether you were in fear.

(Objected to.)

Q. I will ask if any of them were armed in any way?

A. I can't say. I didn't see any.

Q. I will ask you to state whether or not there was any other reason than that that you were driven off that you couldn't comply with the law?

A. I was driven off, is the only reason that I didn't stay there.

65 Q. State whether at any time you in any manner interfered with any papers relating to any appeal or any papers relating to this land in the land office.

A. I never did, sir.

Q. Or ever know of their being interfered with?

A. I never knew that they were.

Q. You are a head of a family?

A. Yes, sir.

Q. You are a citizen of the United States?

A. Yes, sir.

Q. Have you ever homesteaded before you took this?

A. No, sir.

Q. And you took it for your own especial benefit?

A. Yes, sir.

Q. And for no other purpose?

A. And for no other purpose.

66 Cross-examination. Questions by Mr. MARQUETT:

Q. Mr. Morrison, you say that you never told Mr. Chapin that you had Mr. Cameron hired?

A. No, sir; I never did to my knowledge in my life. He said so himself, Mr. Chapin did; I recollect of him saying so.

Q. He came to you and told you you had Mr. Cameron hired?

A. Yes, sir; he said something to that effect.

Q. What did he say?

A. I told him I didn't know. It was about this suit of clothes.

Q. He came and told you that you had Mr. Cannon and Mr. Boyd hired to get this tract of land?

A. I do some day. Yes, sir; that is my intention.
Q. To quit and go to farming?
A. Yes, sir.
Q. What day.
A. I couldn't tell you.
Q. Now you say that you hauled down some lumber there. How much lumber did you haul down?
A. I hauled down a house 12 × 16, two windows and a door, and all that belonged to the house, on these two wagons.
72 Q. How long after you had seen Mr. Stalnaker was it that you told him that you were going to have him arrested for breaking the law?
A. That was about the first of June.
Q. The first of June of what year?
A. It was in June, 1872, and I went down the latter part of August with this house to try and live on the land, and they were there at the time.
Q. When did you first take that as a homestead?
A. I took it the 14th day of May, 1872.
Q. Did Mr. Stalnaker tell you that he was claiming it under a pre-emption right at that time?
A. No, sir; he didn't tell me how he held it at the time. Mr. McMurray that he had a pre-emption right for it, and that he had proved up long ago.
Q. Did you say anything about that?
A. No, sir; I did not.
Q. Now you say that they came there and had your wagons hauled off?
A. Yes, sir.
Q. And that Stalnaker threatened you?
A. Yes, sir.
Q. Now, what did he say? What were the words he used—Mr. Stalnaker?
A. I don't know that I could tell you the identical words, but he came on horseback. He was at one of his threshing-machines, and he came on horseback.
73 Q. You needn't mind telling how he came; just say what he said.
A. He spoke to me and said to get off there immediately; that it was his land. And I said, "No," and I commenced to unload the lumber; and he shoved me aside and put the lumber out across the road.
Q. You said that some others made some threats?
A. Mr. Wymand made threats that Salt Creek would be my bed.
Q. Where was Stalnaker then, when he said that?
A. He was on horseback, right beside of my wagon, and the horsemen were strung all along the wagons.
Q. What did you say?
A. I didn't say anything, only that answer to Mr. Wymand when he said "Old man, how do you like homesteading by this time?" and I said I didn't think I was going to see so many neighbors. And then he made threats, and I got into the covered wagon.
Q. How many was there first rode up there?
A. I don't know; but I think there was from ten to a dozen.
Q. Now, Mr. Morrison, don't you know there was only four rode up from that threshing machine? Was this just when they quit work, when they came?

A. No, sir; it was afternoon when they came first, and when they dragged us off to the road it was after dark.

74 Q. Do you know that in the evening there was only four of them that came there?

A. I know there was more than four of them; there was more than a dozen of them. I know of them now; I have seen them since then.

Q. Who were they? You say you know them.

A. There was Stalnaker and his boys, the McMurrays, and a man by the name of Ryan that I have seen since, and one or two more that were living there.

Q. You may say there was more than four.

A. Yes, sir; more than forty; they magnified as the night drew on.

Q. How far was this from Mr. Stalnaker's house? You say that he was on horseback right beside of the wagon.

A. Yes, sir; they were all standing, a number of them, up next to the wagon.

Q. Don't you know that Mr. Stalnaker walked down from his house and was not on his horse at all?

A. I wasn't near his house at all.

Q. Well, that was not so far but he could walk down.

A. Yes, sir; I expect he did walk down from his house. I expect he went and got on his horse afterwards.

Q. How do you know that he went with these fellows?

A. I said I expect he did.

Q. He went around the neighborhood and got the men, you say?

75 A. He kept with the men I know from the direction of his house; they came from another direction, from the northwest direction.

Q. What arrangements did you make to cultivate this land?

A. To cultivate the land?

Q. Yes. You were going down there to farm. You couldn't farm without anything to farm with, could you?

A. No, sir.

Q. What arrangements did you make to cultivate it? What farming tools did you buy?

A. I didn't buy any.

Q. Did you buy any tools?

A. No, sir.

Q. Not any tools?

A. Not then. I calculated to buy them when I needed them.

Q. When did you suppose you needed them?

A. When I broke the land.

Q. I thought you said that when you went down there you found all but 14 acres broken up.

A. I expected when I went down there that I could compromise with him. I offered to pay him for his improvement before with his own lawyer, Mr. Chapin.

Q. Did you offer him 800 dollars for his improvements?

76 A. No, sir. He said if I would pay him 1,200 dollars, and I told him that I had paid for the land, and that if he would pay me that much he could live there.

Q. You say that you had paid for the land?

A. No, sir, not at that time; since then.

Q. You say that you were going to move down there at that time?

A. Yes, sir.

Q. Had you a house here?
A. Yes, sir.
Q. Had you a house here during that time?
A. Yes, sir; when I was doing business I was living down on 10th street.
Q. Did you sell that?
A. No, sir; I rented it to a man that came from Iowa.
Q. How long did he live there?
A. He was living there when I came home.
Q. He just lived there until you got through living down there?
A. Yes, sir; he said he thought there was not enough business for both of us.
Q. You just got him to stay until you got through down there?
A. Yes, sir.
Q. What was your bargain with him?
A. He was to work here while I was there, and I would come up here and stay a day or two and go back.
Q. You sold out to him?
A. Yes, sir.
Q. What was you to do?
A. I was to take half the stock, but we didn't agree upon the price.
77 Q. There was no agreement made as to the price?
A. No, sir.
Q. Did you move any goods down there?
A. No, sir; only what I needed.
Q. What did you leave here when you moved down there?
A. I don't know that I left anything in particular. I took down what I needed.
Q. What did you leave here?
A. I guess we left the best of our furniture. We didn't need that down there.
Q. That you intended to use here?
A. No, sir; I expected when I was here I would board.
Q. Now, Mr. Morrison, didn't Mr. Stalnaker tell you here in Lincoln that he didn't want to hurt you, but he said you couldn't live there?
A. No, sir; he told me here in Lincoln I couldn't live 24 hours.
Q. Didn't he say that down there, that he wouldn't hurt you?
A. He said he wouldn't hurt me himself; he said he didn't have anything but an old musket.
Q. Didn't he say that he wouldn't hurt you?
A. I don't suppose that Mr. Stalnaker would hurt me himself; he had a son that I was afraid of, and there was others that would hurt me.
Q. You say that after you got here that you were going to have him arrested. Why didn't you have him arrested?
78 A. That was before that.
Q. You never took any steps to have him arrested?
A. Yes, sir; I was going to take out a justice warrant, but was advised that I had better not. I talked with Mr. Lamb about taking out a warrant, and he thought the easiest way would be to send up my complaint to Washington.
Q. And then you could stay here—not have to go away?
A. Yes, sir.
Q. You thought that your easiest way was to send up your complaint to Washington; that that was the best way; did I understand you to say that?

A. Yes, sir; I thought that was the best way and most peaceable way. I couldn't go on and I couldn't move off.

Redirect exam.:

Q. You may state what conversation you had with Mr. Stalnaker with regard to his proving up and pay up for this land. Why didn't he do it?

A. Why he didn't do it?

Q. Yes. The reason why he didn't pay for this land and prove up within a year?

A. I don't know that I had any conversation with him, but I had a conversation with Mr. McMurray.

(Objected to.)

Q. Was Stalnaker present?

A. No, sir; he said he expected to sell it.

79 (Objected to.)

Q. Did you at any time have any conversation with Stalnaker as to why he didn't prove up?

A. No, sir.

Q. Did you, with his attorneys, have any conversation as to why he didn't prove up?

A. No, sir.

Excused.

Court here adjourned until 9 a. m., Nov. 1st.

Court at 9.30 a. m.

HIRAM BOONE testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Mr. Boone, you testified that you were acquainted with these parties, and that you had been upon the land in question?

A. Yes, sir.

Q. And you also testified that you took a lot of the plaintiff's furniture down at the time he moved down there?

A. Yes, sir.

Q. You may state now, in a brief manner, what took place on that day while you were there.

(Objected to as irrelevant and immaterial; overruled, and defendant excepts.)

A. When we drove on the land Mr. Stalnaker wasn't there; we had got our things out, and prepared to get dinner when he came

80 up there and ordered us off, and said that we could not stay there; he said it was his land and he calculated to hold it, and I says to him, "Why don't you comply with the law then;" and he says because—no, I am too fast; we were eating our dinner when Mr. Stalnaker came there and then ordered us away from the land and said we couldn't stay there at all; that he owned the land; and Mr. Morrison told him that he had a right to that land; that he came there to build a house to live in and Mr. Stalnaker told him he couldn't. "Well," says he, "I am going to build a house here, and I am going to live here," and Mr. Stalnaker said he would push it down as fast as he put it up; those were the words that were used there. And Mr. Morrison told the young man that took the load of lumber down there to unload it, and it seems that the boy was afraid to unload the lumber and Mr. Morrison undertook to unload it, and Mr. Stalnaker put it back as fast as he took

it off, and he ordered us off; and we were under Mr. Morrison's orders, and we didn't do it unless he told us to, and Mr. Stalnaker hitched on his wagon and hauled it off, and my wagon; he took a rope and hitched on to the wagon and hauled it off, and I said to him, "Let's see if we
81 can't compromise," and Mr. Morrison said to him, "If you will pay me the money that I have paid I will go and not come back on the land any more;" he said, "You will see me here no more;" but he drove us off the land; at least we were driven on to the road, and the carpenter—they told him to go away. I think they stopped a wagon and put his tools into the wagon and sent him to—I forget the station; I think it was Greenwood, or something like that.

Q. Who else was there at the time Mr. Stalnaker was there and these things took place?

A. At the time he took us off from the land there was some five or six there. I didn't know any of them; they were all strangers to me—that is, besides our party—that is, those that were in Mr. Morrison's employ.

Q. What conversation did you have with him in regard to his right to the land and his proving up?

A. He said he hadn't complied exactly with the law, but that didn't make any difference; that he didn't calculate that a man could come in from Lincoln and interfere with their rights, and if they did they would find their bed in the bottom of Salt Creek; those were the words that were used.

Q. What proposition did you make while you were there?

A. We had got part of our load off, and I see that there was going to be a fuss, and I saw that we couldn't remain there. After dark,
82 or just before it got dusk, I counted 17 men that rode up on horseback, and my wife counted the same, and one of the men asked me if we were going to remain there that night and I told him we were.

By Mr. MARQUETT:

Q. That was about dark?

A. Yes, sir, just after dark; and he says, said he, "I would advise you to take the ladies away," and I told him if the ladies went that we would go to; if they thought we could drive down to Lincoln that night we would go. Some got into the wagon and started, and my brother-in-law that was ahead of us he called me and said that he thought they were in the road ahead of us; but I didn't see them, and we came on up that night.

Q. Where did you see the last man that night?

A. About two miles from there.

Q. Two miles from what place?

A. From the place where we stopped.

Q. From the land in question?

A. Yes, sir.

Q. During all that time was Mr. Morrison, the plaintiff, along?

A. Yes, sir; we came home in the wagon together. We all thought that there was going to be something done.

(Objected to.)

Cross-examination. Questions by Mr. MARQUETT:

83 Q. What relation are you to this plaintiff?

A. We are brothers-in-law, sir; Mr. Morrison married my wife's sister.

Q. Where did you live at this time?

A. I lived in Lancaster County.
Q. What part?
A. Well, south of here.
Q. How far?
A. 18 miles.
Q. You came in to move Mr. Morrison down, didn't you?
A. I was owing Mr. Morrison, and he sent word to me that he would like to have me come in and move him down; he said if I was at liberty to do some work there he would like to have me do it.
Q. Just answer my question. Who was this carpenter that you speak of?
A. I didn't know. I never saw him until that day.
Q. Where did he live?
A. He said he lived in Lincoln, but I didn't know his name.
Q. You don't know who he was?
A. No, sir.
Q. How many men did you say came up at dark?
A. There was 17 men; I counted them.
Q. 17 men?
A. Yes, sir.
Q. And you counted them?
A. I did, sir.
Q. And they were all on horseback?
84 A. Yes, sir.
Q. What time was this?
A. It was just after dark, sir.
Q. Just after dark?
A. Yes, sir.
Q. You say there were five or six there in the daytime?
A. There on the land?
Q. Yes.
A. Yes, sir; I didn't know any of the men that cleared us off except Mr. Stalnaker; he came there first and talked with Mr. Morrison, and forbid us drawing water.
Q. There was nobody there then except Mr. Stalnaker?
A. They were on the road where they drove us off.
Q. How many men were there besides Mr. Stalnaker when they drawed you off?
A. There was four or five men.
Q. Did they help drive you off?
A. I think one man did
Q. How far were you on the land when he done that?
A. We were five or six rods from the line.
Q. You were going to build the house near the road?
A. Yes, sir; some 5 or 6 rods from it.
Q. You told Mr. Stalnaker that he hadn't fulfilled the law?
A. No, sir; Mr. Morrison said he hadn't fulfilled the law.
85 Q. I thought you said you told Mr. Stalnaker he hadn't fulfilled the law?
A. Didn't I recall that? It was he that said he hadn't fulfilled the law.
Q. It was he that said he hadn't fulfilled the law?
A. Yes, sir; and I said, "You had better settle with him, for Mr. Morrison is willing to take just what he paid."
Q. Did you say anything about how much he had paid?
A. Yes, sir; I told him 200 dollars.

Q. And you told him that all he wanted was his 200 dollars?
A. Yes, sir; and Mr. Morrison also told him that all he wanted was his 200 dollars. I said I had about a month's provisions in the wagon.
Q. You took down about a month's provisions?
A. Yes, sir.
Q. Did you intend to stay there?
A. No, sir; I intended to stay there until we got the house built, and then if he wanted me to stay there longer I would.
Q. Were you going to stay there a month?
A. No, sir; he calculated to stay there all the time; he talked to me about going on with the farm and buying stock just as any farmer would do.
Q. He said he was going to quit tailoring?
A. Yes, sir; he said he had got a partner and he calculated to go down and work there and let him tend to the business.
Q. You say there was 17 men there?
86 A. Yes, sir.
Q. Don't you know that there was only those men that was threshing down near there?
A. I don't know anything about those men threshing.
Q. You didn't know that they were threshing near there?
A. No, sir; if they had been threshing they would had harness on their horses.
Q. They had saddles, did they?
A. Yes, sir; part of them had saddles.
Q. None of them had harness on?
A. No, sir.
Q. You say that Mr. Stalnaker told you that you could not stay there?
A. Yes, sir.
Q. Who was by them?
A. Mr. Ricard and Mr. Morrison.
Q. Mr. Rhykerk he was the man that went down with you, was he?
A. Yes, sir.
Q. He was by?
A. Yes, sir.
Q. Who else was by?
A. Mrs. Rhykerk, my wife, and Mrs. Morrison and their daughter, I believe, at the time when Mr. Stalnaker was there.
Q. What was the size of the house that you were going to build; do you recollect?
A. It was 12x16 or 14x16. I had nothing to do with the framing of the house; the house was framed already to put up here in town.
87 Q. Did you all move your families there with the intention of living there?
A. No, sir; my wife went simply at the request of Mrs. Morrison, and they went simply to look at the country.
Q. How many wagons had you?
A. We had three wagons; there was my wagon, Mr. Pawell's wagon, and Mr. Rhykerk's wagon.
Q. There was three wagons altogether?
A. Yes, sir; and I guess Mr. Stalnaker had one there.
Q. Did you take any furniture down there?
A. Yes, sir, I did; I had a stove, chairs, bed, and there was some doors, some cooking utensils, and a table, &c., that I had.
Q. That is all that you took of furniture?

A. Yes, sir; excepting bedding.

Q. Did you take a bedstead?

A. Yes, sir; we had a bedstead, but I know that the bedstead got broke up before we got home.

Excused.

E. W. RHYKERK testified on part of plaintiff.

Questions by Mr. LAMB:

Q. Mr. Rhykerk, you were sworn and testified that you were present at the time Mr. Morrison went down to his homestead?

A. Yes, sir.

Q. And you helped move him there?

A. Yes, sir.

88 Q. You may tell the court what took place there that day at the homestead.

A. It has been some time ago and I couldn't say exactly.

Q. Well, as near as you can.

A. Mr. Morrison sent word to me that he would like to have me come down and take a load out to his homestead. I came down and loaded a load of lumber and took it down to his homestead. I knew nothing about there being any dispute about the homestead until I got there, and I saw there was some breaking and he told me there was some breaking there, and when we got there I saw a house there, and I said "There is a house there," and he said there was another man built a house there, and we hadn't been there long before he came riding down. I think he had a pitchfork, and he said "Get off here every one of you." I didn't pay any attention to him, and he said "Go off from here," said he. "I won't have you here; go along from here; you can't stay here," and Mr. Morrison came up and said he was going to build a house here, and he said "You can't have a house here," and he talked very wild, and he finally got the carpenter scared.

(Objected to.)

Q. State how he acted.

A. He was so scared he couldn't put his tools in the wagon. During this time there came several men out of the fields on horses

89 but I didn't pay much attention to that. During this time Mr. Morrison was taking some of the lumber out of the wagon, and there was a boy there. I don't know what his name was, and Mr. Morrison said to him "Unload your things off the land," and he didn't do it, and, said I, "Why don't you unload your things off your wagon," and he said, "I daresant," and said I, "You are not afraid to unload your things off from the wagon, are you?" "Yes," he said, he understood it was going to be pretty hot there. He commenced to unload the things off the wagon and Mr. Stalnaker said, "If you do that you will get yourself in business, if you stay here until after dark," and the men kept running backwards and forwards, but there was nobody very badly scared, and finally Mr. Stalnaker came round to me and said, "I want you to take this wagon off from here," and I said, "Mr. Morrison, do you want me to take these things off from here, or do you want them unloaded?" and Mr. Morrison said, I want them unloaded;" and I unloaded my wagon, and I told Mr. Stalnaker I didn't see why he wanted to act the way he did about such things. Said I, "There is a way to fix up these things." Then Mr. Stalnaker commenced to haul my wagon off, and one of the men took me aside and said, "If you don't go off from here you will find the bottom of

90 Salt Creek; and I told him I had heard of such things before. I

didn't know the man. I had never seen him before; and Mr. Stalnaker talked to me very much about it, and told me he wanted me to go off from there; and the boy, they had him pretty badly scared and he took his load off outside of the land about 15 or 20 rods—I can't say exactly how far it was—and these men still kept running around, some 3 or 4 of them, one way and another. Some kept talking one way and some another, and there was one young fellow said, said he, "If you leave Mr. Morrison here he will be killed before to-morrow morning;" said he, "He will be killed before ten o'clock;" said he, "We don't allow any dammed son of a bitch from Lincoln here;" and, said I, "Hold on, you don't want to talk that way," said I, "There is nobody going to be hurt here," and I told him to keep still, and he stopped, and he got out by the side of the road. I don't know whether Mr. Morrison was talking to Mr. Stalnaker or Mr. Boone; there was one or the other talking to him, and he told Mr. Boone or Mr. Morrison, I can't say positive which, but I think it was Mr. Boone, and he said he hadn't complied with the law; but he said he didn't propose to give up the place, or something of that style; I can't say what it was. Along about dark the carpenter and the boy had
91 left, and we were left without our team, and we had to draw all the stuff on the two wagons, and there came, I should say, from 12 to 16 more men; there may have been more, I should say when they came there might have been 17, they came right up. I was tying my load on, and one of them came up and jumped off his horse and said, "Which way are you going;" and I said, "I am standing still now," and he said, "You are going anyway," and said I, "I expect likely, I will if I can ever get hitched on," and he said, "By God, you had better go," and he jumped down off his horse, and Mr. Morrison was standing there, and I said to Mr. Morrison, "You had better go and get into the wagon;" and he said, "Why don't you leave him standing there, and we will fix him." Said I, "That is no way to do business, 16 or 17 of you to pitch on one man, and a cripple at that;" said I, "That is no way to do business; if there is trouble, why can't you fix the thing up between yourselves;" and he said something about if we staid there that we would get into a watery grave. Well I didn't say anything more then; they was a little bigger crowd than I, and I didn't know but what I would get into trouble myself. Well we went on and when we had got about a quarter of a mile from the land I saw quite a crowd running up from towards the creek. There was
92 a stream about two miles from this land and I saw about 8 or 10—may be there wasn't more than five or six—I couldn't say for certain; and when we struck the turning I saw two or three cross the road, and I didn't see the rest and I thought they had stopped. Mr. Boone was in the wagon, and I said we might as well die here as anywhere, and we will go down and see; but he said we might as well drive on, and we did. I didn't know whether my team was strong enough to drive up the hill or not. My wife was in another wagon and I told her to drive up close and we went on, and we saw them down below the hill. I didn't know whether it was their intention to molest us or just keep us from going on the land; we didn't see them any more after that.

Cross-examination. Questions by Mr. MARQUETT:

Q. You say you didn't know who the carpenter was?

A. No, sir; I didn't know his name.

Q. You say he was pretty badly scared?

A. Yes, sir; I think he was. I know if I looked the way he did that I would be scared.

Q. How did he look?

93 A. Well, as the old woman said, he got pale behind the ears.

Q. He got pale behind the ears?

A. Yes, sir; he got pale.

Q. You didn't get pale behind the ears?

A. No, sir; but I got pale around the nose, or around here (showing) when I saw them getting thick around there.

Q. When was it you got scared?

A. I got pretty badly scared when they rode right up like a set of warriors.

Q. That is the time that your nose got pale?

A. Yes, sir; that is the time when my nose got pale when they came right up in front.

Q. Mr. Stalnaker didn't interfere with you when you undertook to throw off your load?

A. No, sir; Mr. Stalnaker didn't interfere.

Q. He did interfere when Mr. Morrison undertook to unload?

A. Yes, sir.

Q. He didn't hurt him or anything?

A. No, sir.

Q. He simply put the lumber back?

A. Yes, sir.

Q. You say there was 12 or 15 or 16 or 17 men, you don't know how many there was?

A. I couldn't say positive. I was busy getting off the land. I think there was 12 or 15, and there was three or four more came whooping and halloing.

Q. You stopped and counted them, did you?

A. Yes, sir; I was busy tying my load on and I counted them, and I thought there was 12 or 15, and there was two or three came afterwards.

94 Q. Did they come together?

A. Part of them did; there was some of them came down from Mr. Stalnaker's on horseback.

Q. Was Stalnaker on horseback?

A. I think he was, though he might not have been.

Q. How far was that from Stalnaker's house?

A. It might have been 30 or 40 rod.

Q. How come you to go down there?

A. Mr. Morrison employed me. I live about 18 miles from here. I was hauling lumber for my house when he hired me.

Q. You didn't know anything about this land being in dispute when you went there?

A. No, sir.

Q. And you didn't know anything about his having the land broke up or having a house on it?

A. No, sir; I didn't know it until Mr. Morrison wanted me to haul a load of lumber out there.

Q. Had you been acquainted with Mr. Morrison before this?

A. I had made the acquaintance of Mr. Morrison about a year or a year and a half before this. He had been at my house once or twice, I guess—once, I am positive. I don't know whether he was there more that one time. He might have been there twice. I have seen him several times when he was here in town; at the same time he arrested this man here.

Excused.

95 Plaintiff's counsel offers in evidence a copy of a letter from the General Land Office to the register and receiver of the land

office in Nebraska, dated July 23, '70, Exhibit E. It is admitted that these are the instruments from the Commissioner of the General Land Office in the district.

Exhibit E found on next page.

96 DEPARTMENT OF THE INTERIOR,
General Land Office, July 23d, 1870.

REGISTER AND RECEIVER,
Lincoln, Nebraska:

GENTLEMEN: Referring to our letter of 21st ult., I am now in receipt of yours of 7th in explanation of your refusal to receive the application of Samuel Stalnaker to make homestead entry of the E. ½, N. E. ¼, sec. 10, T. 10, R. 9 E., Nebraska. You state that at the date of Mr. Stalnaker's application this tract was occupied by an actual settler, who filed declaratory statement 4141, June 3, 1869, and further that he had failed to prove up within the time required by law; but, as he was a poor man, you considered he ought not to be deprived of the land. This tract being offered land the filing expired on June 3, 1870, and as the party failed to prove up he forfeited all claims to the same, and the land was open to entry by the first legal applicant. As Mr. Stalnaker made application under the homestead law in due form, and tendered the fees for same, as shown by his affidavit and the corroborative testimony of two witnesses, his entry should have been allowed. You will notify the parties of this decision, and that Mr. S. will be allowed to perfect his entry of the tract, which you will transmit with your current returns.

Very respectfully,

JAS. S. WILSON,
Commissioner.

97 U. S. LAND OFFICE AT LINCOLN, NEB.,
February 8th, 1876.

I do hereby certify that the foregoing is a true and accurate copy of Com's letter "F," dated July 23d, 1870, and which is now on file in this office.

GEO. P. TUCKER,
Receiver.

SAM'L STALNAKER called by the counsel for plaintiff for the purpose of further cross-examination.

Questions by Mr. LAMB:

Q. I will ask you, Mr. Stalnaker, whether or not you didn't exercise your right of pre-emption in the State of Iowa before you came here?

A. No, sir.

Q. Nor ever at any time?

A. No, sir; nor ever at any time.

By Mr. MARQUETT:

Q. Did you ever tender the money to the land office through the register and receiver in the land office?

A. Mr. Chapin tendered it, and I was present when he tendered it to Mr. Sommerlad.

Q. For you?

A. Yes, sir.

Q. On what ground did they refuse?

(Objected to as incompetent, immaterial, and irrelevant. Overruled, and plaintiff excepts.)

98 A. That there was a homestead on the land.

Q. On the sole ground that there was a homestead on it?

(Objected to as incompetent, immaterial, and irrelevant; that the records is the best evidence, and that no foundation has been laid for the introduction of secondary proof. Overruled, and plaintiff excepts.)

Cross-examined by Mr. LAMB:

Q. How much money did Mr. Chapin offer to pay for the land?

A. He offered a check for 200 dollars, and he told him that was more than there was to pay, but he would tender him that check for 200 dollars to pay for the land.

Q. Whose check was it?

A. I believe that Mr. McConiga drew the check. I think he did.

Q. Do you know by whom it was signed?

A. No, sir; I didn't like to look at the check. Mr. Chapin asked him for 200 dollars, and he said he didn't just have it in his pocket, and he gave him a check on the bank, and he offered it to Mr. Sommerlad.

By Mr. MARQUETT:

Q. What did Mr. Sommerlad say when he tendered it?

(Same objection overruled and plaintiff excepts.)

A. He said it was homesteaded.

Q. Did Chapin say anything about it—that it was not homesteaded? (Obj. to.)

99 Q. State what was said.

A. I don't recollect what he said when he paid the money over, but only he said he would not receive the check. He said there was a homestead on the land and he wouldn't receive it.

The following testimony is offered as rebutting evidence:

And came the defendant, and for the purpose of maintaining the issues on his part, offered the following rebutting testimony, which is all the testimony given in said case.

Q. Mr. Stalnaker, you heard the evidence of Mr. Morrison and these other two witnesses about this matter?

A. Yes, sir.

Q. What were you doing when they moved on there that day?

A. I went over to help Mr. McMurray thresh. Their land is on the same section, about a mile from there. When I got there I was informed that Mr. Morrison had moved on the place, and came on to my house and went over there.

Q. Who went with you?

A. Nobody.

Q. Nobody at all?

A. No, sir.

Q. How many were there when the wagons were driven off besides those that were with John Morrison?

100 A. I believe Job McMurray and John McMurray and John Wymand, besides my little boy.

Q. Where did these men come from?

A. Mr. McMurray came from home; he and Mr. Wymand were going for a load of hay and they see these men there, and they just drove up there.

Q. Did you ask them to go there?

A. No, sir; I didn't know that they was coming until they came.

Q. You heard the evidence here where they say that there was some 12 or 15 or 16; what was there of that?

A. Well, they was coming home with my son; there was my partner, Ryan, and McMurray and Wymand; they was threshing over there at that machine, and when they got through work they came home about dusk, and McMurray lived at the corner from my house, and when he was going home he had to pass my house and Mr. Rhodes' house. These were three horses that rode up to the wagon. I didn't ride up. I went up afoot; it was close to my house and I didn't ride up, and that was between sundown and dark.

Q. Was you there later than that time?

A. No, sir; they left between sundown and dusk; it was not right dark when they left; it wasn't dark enough to need a lantern.

Q. Did you follow them any?

A. No, sir; we see them start and we didn't follow them.

Q. Where did you say that you came from?

101 A. We came from the north; the boys had been putting their horses in the stable; they had been threshing.

Q. Was there any threats made at this time?

A. Well, I didn't make any, but I believe that Wymand told him that if Boyd ever came down there they would put him in Salt Creek, but I heard threats about nobody but Boyd. Mr. Wymand done that; he told him that if Boyd came down they would put him in Salt Creek, but I heard no threats against Mr. Morrison; that anybody would put him in Salt Creek.

Cross-examination. Questions by Mr. LAMB:

Q. What relation are you to Mr. McMurray?

A. Not any.

Q. How long has he lived down there by you?

A. I think ever since I have been there.

Q. Where were you on that night after dark?

A. I was at home.

Q. You don't know anything about what took place after you left?

A. No, sir.

Q. Do you know anything about what took place out on the road?

A. No, sir.

Redirect:

Q. Mr. Stalnaker, one of the witnesses swears that you went around to hunt up your neighbors.

A. No, sir; I didn't know anything about it. I went home and

102 staid in the house. I didn't know anything about it.

By the COURT. They said they expected they did.

By Mr. MARQUETT. Yes; he went altogether on expectations.

Excused.

Mrs. RHYKERK testified on part of plaintiff. Questions by Mr. LAMB:

Q. You are acquainted with Mr. Morrison?

A. Yes, sir.

Q. And with Mrs. Morrison?

A. Yes, sir.

Q. And you were with them some time in 1872, when they went down to their homestead in Cass County?

A. Yes, sir.

Q. Were you there on the place at the time they drove on to the land and took dinner on the place?

A. Yes, sir; I was one of the party.

Q. Did you see Mr. Stalnaker there; this gentleman here (showing.)

A. Yes, sir.

Q. Now, tell in your own way what took place there at that time.

A. Well, we went on the place and took dinner. I didn't know there was any trouble when I went down. I just went for company to Mrs. Morrison, and Mr. Stalnaker came there with two or three other
103 men and appeared to be very mad, and said that Mr. Morrison nor any other man could stay on that place, and Mr. Morrison wanted to compromise, and he said he wanted to get his money back and he would go off and stay, and Mr. Stalnaker said, no, he didn't want us there nor anybody else, and he said then if we staid there we would be buried in Salt Creek, and he hitched his horses to the wagon and drove us across to the road.

Q. Did you have anybody else there after that in the evening.

A. Yes, sir; I counted, I think, about 16 or 17, I wouldn't be certain which. I know some of them was scared.

Q. What time in the day was that?

A. It was after dark; I can't tell what time it was, but it was after dark.

Q. And after you started from there, how long did you see them about?

A. We looked back and we could see them every little while. I can't tell, I never was there before nor since, but it was quite a ways and I heard the men folks say—

(Objected to.)

By the COURT:

You are stating what your own folks said?

A. Yes, sir.

(Objection sustained.)

104 Cross-examination. Questions by Mr. MARQUELT:

Q. What relation are you to Mr. Morrison?

A. Not any at all.

Q. How many of them was there that went down in Mr. Morrison's company?

A. In Mr. Morrison's company, or just all of us together?

Q. Just all the company?

A. All the company that went on the place with Mr. Morrison?

Q. Yes.

A. There was Mr. Boone and his wife and Mr. Morrison and his wife, and me and Mr. Rhykerk and a carpenter.

Q. How many came with Mr. Stalnaker in the daytime. You say that he came there in the daytime and told you to go off?

A. As near as I can recollect three or four.

Q. Now what time was it in the evening when you say that all these other men came.

A. I couldn't tell you, sir.

Q. How long after dark?

A. Well, I don't know as I could tell you that. It was after dark. In the edge of the evening, but I couldn't tell you what time it was. We didn't think of the question of time. I know I didn't.

Q. But it was after dark.

A. Yes, sir; it was after dark.

105 Q. Are you certain it was after dark or just after sundown?

A. No, sir; I am certain it was after dark.

Q. Then you attempted to start?

A. Yes, sir.

Q. What time did you determine to start?

Q. You was not frightened, was you?
A. Yes, sir; I was.
Q. You was not so frightened but what you could count them?
A. No, sir; I wasn't.
Q. How came you to count them?
A. I wanted to see how many there was.
Q. You counted them because you wanted to see how many there was?
A. Yes, sir.
Q. And you think there was precisely 17?
110 A. I can't say, but I think there was 17.
Q. What relation are you to Mr. Morrison?
A. I am his sister-in-law. I am his wife's sister.
Excused.
Plaintiff rests.

Defendant's rebutting.

JOHN MCMURRAY.

Questions by Mr. MARQUETT:

Q. Mr. McMurray, you heard these witnesses here, Mr. Morrison, Mr. Boone, and some others?
A. Yes, sir.
Q. Were you one of the parties that was there during this transaction that they have related?
A. I was part of the time.
Q. When did you first go there?
A. I went away from home help my brother thresh, but the machine didn't go as soon as I thought it would, and I went back home again. It was only just about a mile from the place, and I went home and I saw them there, and I went down there. It was only about 40 rods from our house where Mr. Morrison was, and I went down there, and I was talking around, and a few minutes after I come this carpenter told me he wouldn't touch a lick of work there if there was going to be any trouble; and if he could get any chance, he would
111 go to Greenwood, and I saw Mr. Ward, one of my neighbors, going down to Greenwood with a load of wheat, and, said I, "There is a man going to Greenwood; you can go with him;" and he said, "If you will hail him I will go," and we hailed him, and he went along with him.
Q. You heard the testimony about his being so scared, and about his being white behind the ears?
A. He didn't seem scared.
Q. You heard the testimony about his being taken off?
A. No, sir. He said, "If I can get a wagon, I will go to Greenwood;" and said I, "There is a wagon going to Greenwood." This Mr. Ward I knew was hauling wheat to Greenwood, and my father and I was standing there, and we hailed him, and he got on the wagon and went to Greenwood, and there was no one went with him but Mr. Ward, and my father was there, and Mr. Smith was threshing around there, and he was there too.
Q. How many was there then?
A. I and my father and Mr. Smith and Mr. Wymand and Mr. Stalnaker was there, and there was one or two little boys there, but there was no other man.
Q. Smith, you say. Who was he?
A. I guess his place joins there; it is not more than half a mile from Mr. Stalnaker's.

112 Q. What does he follow?

A. He follows farming.

Q. How came he there?

A. He had been threshing for my father. I didn't go down there in the evening. Mr. Stalnaker pulled Mr. Morrison's wagon out, and I left right then, and went to my place.

Q. You heard about all of these men coming there between sundown and dark, or about dusk?

A. That was when they were coming home from my father's. I wasn't here during the night—during the evening.

Q. How many persons was present then?

A. There wasn't to exceed six.

Q. Where did they come from?

A. They came from father's, where they had been threshing, and the other Stalnaker was working with my father on the threshing machine.

Q. Was Mr. Stalnaker there?

A. Yes, sir; and Mr. Stalnaker put his horse in the stable, and I was riding my horse. I was only about 300 yards from the house. I was riding one of the horses, and leading the other, when Mr. Stalnaker came out there, and Mr. Wymand talked to him, and wanted to know how he was getting along, but I don't know that I said a word to him.

Q. Did anybody ask you to go there at that time?

A. No, sir; there was not, because I was on my road home.

113 Q. How came Mr. Wymand there?

A. He came along with me, I believe. I went home before they tarted; if I didn't, I went right afterwards, and put up my horses.

Q. Did you know anything about this crowd that was there following these teams?

A. No, sir; I didn't know anything about that until I came here yesterday; and if they ever did follow them, I never heard of it before. I went home, and put up my horses, and went to bed. I didn't know anything about it.

Cross-examined. Questions by Mr. LAMB:

Q. About what time did you go across there that evening?

A. It was about dusk. I left my father about sundown.

Excused.

SAMUEL STALNAKER:

Questions by Mr. MARQUETT:

Q. Mr. Stalnaker, do you know anything about this carpenter leaving?

A. Yes, sir.

Q. Was there anything said to him that caused him to leave?

A. When I rode down I saw him there; he didn't say any-

114 thing about at first, only a little bit; when I ordered him to leave I was talking to him, and he said, "I didn't know there was any trouble here," and he said, "If I could go to Greenwood I would go," and wanted to know when the train left; and I told him if he wanted to go on the train that I had a team in the stable, and that I would take the team and take him against the time that the train went.

Q. Was there any threats made there to him?

A. No, sir. There was no threats made—only the threats about Boyd.

Cross-examined. Questions *about* Mr. LAMB:

Q. Did you or did you not tell Mr. Morrison to leave that land?

A. I told him he couldn't stay there.
Excused.

W. F. CHAPIN testified on part of defense.

Questions by Mr. MARQUELT:

Q. Mr. Chapin, you were up there and offered to pay the register and receiver, *on* the register for this land?

115 A. Yes, sir. I went there and tendered the payment.

Q. Did he make any objection to its being a check instead of money.

(Objected to.)

Q. State what was said and done there.

A. I presented the check, as it was usual for me to do in making payment at the land office, and he objected to it.

Q. What did he say ot the time that you tendered it to him?

A. The objection was that Stalnaker hadn't proved up in 12 months, as he alleged was provided by law, and that there was an adverse claim, that Mr. Morrison had since attached.

Excused.

Defendant rests.

I hereby certify to the foregoing transcript as a true and complete copy of all the evidence introduced on the trial of the cause of Morrison vs. Stalnaker, as taken by me on the introduction of the same.

CHAS. TOLLES,
Official Reporter, 2d Jud. Dist.

116 Received March 13th, 1867, at 1 o'clock, p. m.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 1st, 1867.

REGISTER AND RECEIVER,
Nebraska City, Neb.:

GENTLEMEN: Under date of December 17th, 1866, and January 25th, 1867, a restoration was ordered by Secretary of the Interior of the lands which had heretofore been withdrawn for the Burlington & Missouri River Railroad outside of twenty miles from the line of route, and that the even sections within 20 miles of the line of road would be increased to the double minimum price.

The diagram herewith shows the line of road in your district with the 20-mile limits. The odd section within the 20-mile limits are reserved and the even sections within the said limits will be increased in price to 2.50 per acre, and hereafter will only be subject pre-emption and homestead at that price, except where inceptive rights under the pre-emption law may have ac'rued prior to the receipt of these instructions by you.

The register will proceed at once to lay down in pencil on the township plats the line of route of the road and the 20-mile limits, and make the proper notes thereon showing the odd numbered sec-

117 tions to be reserved—the even sections to be 2.50 per acre.

The southern 20-mile limit of the Union Pacific Railroad, so far as the limits of the two roads come in conflict in your district, as shown upon this diagram, and when the railroad companies make their selections, the lands in conflict between the two limits should be selected jointly for both roads. The lands to be restored in your district are the odd sections outside the 20-mile limit in township 7, of range 8 to 16

east, township 8 of ranges 9 to 15 E., township 9 of ranges 12 to 14 east, *east* tpt. 10, ranges 13 & 14 east, and township 11 of range 14 east, and odd sections between south limit of Union Pacific and north limit of this road in township 12, of ranges 3 & 4 east, inclusive, township 13 of ranges, 1 to 5 east, inclusive, township 14 of ranges 1 to 6 east, inclusive.

You will give notice by public advertisement that on a certain day, not less thirty days from the date of notice, the lands thus withdrawn will be restored those which had been offered at public sale to private entry, and when the same had not been offered to settlement and entry under the pre-emption and homestead laws, the notice will be published once a week for the time specified in a newspaper having the largest
118 circulation in your district. The notice will only give the towns and ranges within which the odd sections are to be restored, and for information as to particular tracts to be restored. You will refer parties to your office. If two or more parties apply on the last day—the day of restoration for the same tract, it will be put up at auction and sold to the highest bidder. If not paid for on that day it will be put up on the next day, and if not then purchased it will thereafter be subject to private entry.

You will transmit a list of the lands restored to private entry. Also a list of the lands restored to pre-emption or homestead with a joint report, and will transmit copies of the papers containing the advertisements, taking care in the first instance to make out and have ready for public inspection, in your office, the list of land thus to be restored, each class to be, of course, in separate lists. The receiver, as acting disbursing agent, will pay for the advertising at the rate of seventy-five cents for the first insertion and thirty-seven and a half cents for each subsequent one—brevier emms. Reference will be made to the date of this on publishers' receipt of payment, to which will be attached a copy of the advertisement. Acknowledge receipt.

Very respectfully, yours,

JOS. S. WILSON,
Commissioner.

119 NOTE.—It is important that you make out each of the said lists of duplicates as preliminary to restoration, and that you should at once send to this office duplicates of the original you retain in your office as a basis of operations under these instructions.

JOS. S. WILSON,
Commissioner.

That thereupon after the closing of the testimony, as well on the part of the said plaintiff as on the part of the said defendant, the said defendant claimed that the said issues ought to be found in favor of him, the said defendant, and prayed the court to find and adjudge the said issues in his favor accordingly. But the court held and decided the said issues in favor of the plaintiff.

To which opinion, ruling, and decision of the said court the said defendant duly excepts.

S. B. POUND, *Judge.*

120 And now upon this 18th day of December, A. D. 1876, one of the days of the October term of the district court of the second judicial district of the State of Nebraska, held in and for the county of

Lancaster, came the said defendant, Samuel Stalnaker, and upon the overruling of his motion for a new trial in this cause, duly excepted thereto and prayed that his bill of exceptions in that behalf might be allowed and all the testimony presented, as well for the plaintiff as for the defendant in said case fully appearing hereinbefore.

This said bill of exceptions is by the court allowed, and upon the motion of the said defendant it is ordered to be made a part of the record in this case.

S. B. POUND, *Judge.*

121 STATE OF NEBRASKA,
Lancaster County, ss:

I, William A. Sharrar, clerk of the district court of the 2nd judicial district of Nebraska, within and for the county of Lancaster, do hereby certify that the above and foregoing is a true and correct copy of the bill of exceptions, allowed in the case of John Morrison vs. Samuel Stalnaker, and that said bill of exceptions contains all the evidence introduced on the trial of said cause.

Witness my hand and the seal of said court at Lincoln, this 28th day of April, A. D. 1877.

[SEAL.] WM. A. SHARRAR,
Clk D. C.

122 TRANSCRIPT.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

123 Pleas before the Hon. Geo. B. Lake, judge of the district court of the second judicial district of Nebraska within and for the county of Lancaster, at an adjourned Nov. term, 1875, of said court, began and held at the office of the clerk of said court, in the city of Lincoln, on the 4th day of January, A. D. 1876, commencing at 4 o'clock, p. m.

Be it remembered that heretofore, to wit, at the several times hereinafter mentioned, in a case in the above-named court wherein John Morrison was plaintiff and Samuel Stalnaker was defendant, the following papers were filed in the office of the clerk of the court and other proceedings had and done in said above-entitled cause, as follows, to wit:

124 On the 10th day of May, A. D. 1875, was filed in the office of the clerk of the district court for Lancaster County, Nebraska, the following papers to wit:

(Endorsement on wrapper:) District Court. John Morrison vs. Samuel Stalmaker. Pl'ffs petition. Filed Oct. 1st, 1873. D. W. McKinnon, clerk. No. 68. Wheeler & Stinchcomb. Lamb & Billingsley for pl'ff.

We do hereby become responsible for the costs in this action.

JOHN W. HAINES.

I, clerk of said court, approve the above security.

D. W. McKINNON, *Clerk.*

Filed May 10th, 1875. Wm. A. Sharrar, cl'k D. C. By J. P. Hebard, deputy.

125 Filed Oct. 1st, 1873. D. W. McKinnon, clerk dist. court.

Petition.

In the district court of the second judicial district held in and for Cass County, State of Nebraska.

JOHN MORRISON, PLAINTIFF,
against
SAMUEL STALNAKER, DEFENDANT.

The above named plaintiff for cause of action against the above named defendant says:

FIRST CAUSE OF ACTION.

That he is seized in fee of the following lands and tenements, viz:
The north half of the northwest quarter of section eighteen (18) in township eleven north, range nine (9) east, lying in Cass County, State of Nebraska.

That this plaintiff is entitled to the possession thereof, and that the said defendant unlawfully keeps him, the said plaintiff, out of the possession thereof.

SECOND CAUSE OF ACTION.

And this plaintiff further says that the said Samuel Stalnaker
126 has been in the possession of the said premises, receiving the rents, issues, and profits therefrom from the first day of June, A. D. 1872, up to the time of the commencement of this action, and the plaintiff avers that he has sustained damages by the unlawful withholding of the possession of the said premises during all that time to the sum of $1,000.00

The plaintiff therefore prays judgment against the said defendant for the recovery of the possession of the said premises and also for the said sum of $1,000.00, his damages so as aforesaid sustained.

JOHN MORRISON,
By LAMB & BILLINGSLEY, AND
WHEELER & STRICKLAND,
His Att'ys.

STATE OF NEBRASKA,
Lancaster County, ss:

John Morrison, being first duly sworn, on oath says, he is the plaintiff in the foregoing action, and that the several matters and things set forth in the foregoing petition are true, as he verily believes.

JOHN MORRISON.

Subscribed in my presence and sworn to before me this 22d day of September, A. D. 1873.

[SEAL.] CHARLES O. WHEDON,
Notary Public.

127 *Precipe.*

In the district court of the second judicial district held in and for Lancaster County, in the State of Nebraska.

JOHN MORRISON, PLAINTIFF,
against
SAMUEL STALNAKER DEFENDANT.

This is a civil action brought by the above named plaintiff against the above named defendants in said court for the recovery of real estate & mesne profits.

The clerk will issue summons in said action, without endorsement, against said defendant, returnable according to law.

LAMB & BILLINGSLEY AND
WHEELER & STINCHCOMB,
Plaintiff's Attorneys.

The above is endorsed: District court. John Morrison vs. Samuel Stalnaker. Precipe. Filed Oct. 1st, 1873. D. W. McKinnon, clerk dist. court. Wheeler & Stinchcomb, Lamb & Billingsley, plaintiff's att'ys.

128 (Indorsement:) Summons. Attest D. W. McKinnon, clerk. Wheeler & Stinchcomb, Lamb & Billingsley, attorneys for plaintiff. Returned and filed Oct. 13th, 1873. D. W. McKinnon, clerk.

THE STATE OF NEBRASKA,
Cass County, ss:

The people of the State of Nebraska to the sheriff of said county of Cass, greeting:

You are hereby commanded to notify Samuel Stalnaker, defendant, that he has been sued by John Morrison, plaintiff, in the district court of the second judicial district in and for said Cass County, and that unless he answer by the 3d day of November, A. D. 1873, the petition of said John Morrison, plaintiff, filed against him in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on or before the 13th day of October, A. D. 1873.

Witness my hand and the seal of said court at Plattsmouth,
129 this 1st day of October, A. D. 1873.

[SEAL.] D. W. McKINNON,
Clerk of the District Court.

I received this writ Oct. 1st, 1873, and on the 6th day of Oct., A. D. 1873, I summoned the within-named Samuel Stalmaker by leaving at the said defendant's usual place of residence in Cass Co., Neb., a certified copy of this writ, with all endorsements thereon.

J. W. JOHNSON,
Sh'ff Cass Co., Neb.

Fees, $5.00.

130 (Indorsement:) John Morrison vs. Samuel Stalmaker. Demurrer. Filed Nov. 10th, 1873. D. W. McKinnon, clerk dist. court. Chapin & Marquett.

In the district court of 2d judicial district, in & for Cass County.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the said defendant and de*nies* to the petition of plaintiff and for cause of said demurrer says:

That the said plaintiff has in his said petition improperly joined causes of action which cannot be legally joined in the same petition.

Wherefore the said defendants for the cause aforesaid asks if the said plaintiff shall be permitted to have or maintain his said action thereof against defendants.

T. M. MARQUETT,
Att'y Def't.
& WM. F. CHAPIN.

131 (Indorsement:) John Morrison vs. Samuel Stalmaker. Precipe. Filed July 13th, 1874. D. W. McKinnon, clerk dist. court.

July the 13*th*, 1874.

GREENWOOD,
CASS CO., NEB.

DEAR SIR:

W. M. MCKINNON:

I want you to send me, by return mail, in that case of John Mor'son and I, a sum'ons for Jacob Kimmer and A. McMurray.

And oblige yours,

SAMUEL STALNAKER.

132 (Indorsement:) John Morrison vs. Samuel Stalmaker. Answer. Filed July 21st, 1874. D. W. McKinnon, clerk dist. court.

The district court in and for Cass County.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the defendant*s* in the above-entitled cause, and for answer to the petition of the said John Morrison, saith that he, the said defendant, does not unlawfully keep him, the said plaintiff, out of the possession of said premises in his said petition demanded, as there alleged, and of this he puts himself upon the country.

T. M. MARQUETT,
Att'y for Pl'ff.

THE STATE OF NEB.,
Cass County, ss:

Samuel Stalnaker, being first duly sworn, deposeth & saith that he is the defendant in the above cause, and that the matters and things set forth in the foregoing answer are true, as he believes.

SAMUEL STALNAKER.

133 Sworn to before me & subscribed in my presence this 21st day of July, 1874.

D. W. MCKINNON.

(Indorsement:) John Morrison vs. Samuel Stalmaker. Motion for new trial. Filed July 21st, 1874. D. W. McKinnon, clerk dist. court.

In the district court of 2.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the defendant and moves the court to set aside the verdict and judgment in this cause, and set the same down for a new trial. The request is made by defendant.

T. M. MARQUETT.

134 (Indorsement:) John Morrison vs. Samuel Stalmaker. Motion for an application to enjoin proceedings in this case. Filed March 15, 1875, D. W. McKinnon, clerk, by Wm. L. Wells, clerk.

In the district court of the 2d judicial district in for Cass County, Nebraska.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the defendant in the above entitled cause and moves the court to restrain proceedings in this cause, for the reason that the said defendant has filed his bill asking that the said plaintiff be declared a trustee. That he holds the land in question in trust for the defendant in this case; and that the said plaintiff be required to deed said land in dispute in this action to defendant; and that the determination of that case will determine this, as will appear by the inspection of the papers therein filed.

Defendant therefore asks that the proceedings in this case be enjoined until the case of Samuel Stalnaker vs. John Morrison be first heard.

CHAPIN & MARQUETT,
Att'ys for Defendant.

135 (Indorsement:) John Morrison vs. Samuel Stalnaker. Answer. Filed March 18th, 1875. D. W. McKinnon, cl'k, by Wm. L. Wells, dep.

In the district court of the 2d judicial district in & for Cass County, Nebraska.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Defendant denies that the plaintiff is entitled to the possession of said land, or that the right of possession is plaintiff's.

Defendant, for further answer to plaintiff's petition, avers that on the 18th day of January, 1871, he settled upon the north half of the north-west quarter of section eighteen (18), township eleven (11) north, range nine (9) east of the principal meridian. That on the 16th day of February, 1871, he made his declaratory statement and filed upon said land,

claiming the same as a pre-emption right. That at the time he so set-
tled upon said land there had been upon the same improvements,
136 to wit, one house, 14 by 16, worth about $200, for which and the
claim the plaintiff gave the sum of $800.

That plaintiff, upon taking possession of said land, did put a base-ment story under said house worth $150. Defendant also built an addition to said house; and did, on or about the 16th day of February, 1871, move into said dwelling-house and upon said real estate, and has ever since resided upon said land.

Defendant further says that since making said settlement he has otherwise improved said tract of land by breaking up fifty acres and by cultivating the same, and has planted upon the same about 4,000 forest trees; and has ever since improved the same, and has dug a well upon said tract.

That on or about the 14th day of May, 1872, he appeared at the Lincoln land-office before the register and receiver of said land-office with his witnesses ready to prove up and show that in all respects he was entitled to a pre-emption of said land, and was ready and offered to pay for the same; but the said register & receiver of the said land-office .

That he was ready and offered to prove by two disinterested witnesses the facts, and did prove the facts as above stated, about defendant's set-
tlement upon said land; and proved by said witnesses that plaint-
137 iff settled upon said land on the 10th day of May, 1871. That he
put upon the same addition to the house that was upon the said premises, built a bacement, dug a well, and put under cultivation the greater portion of said land, and had it then under cultivation, and had resided upon said land ever since the 10th day of May, A. D. 1871. That he was the head of a family; and that his family resided upon said land during that time. But the said land-officers refused to allow defendant to prove up and purchase the said land.

That at the time he settled upon said tract of land and filed his declatory statement he had never before had the benefit of the pre-emption law; had never filed on any tract of land, nor had he ever laid claimed to any tract of land under the pre-emption law of this State the United States; and at said time was a citizen of the United States and was over the age of twenty-one years, and was the head of a family.

All the facts as above stated, and many more such, upon said day proven by the said defendant by competent witnesses, showing that
he had a right to purchase and pre-empt said land, all of which
138 testimony, as required by law and the regulation of the land de-
partment of this government, is required and filed for the purpose of transmitting to the General Land Office at Washington.

That upon said day the defendant made the necessary oath required for him to make by law and the regulation of the said land department to be entitled to pre-empt said tract of land. It was further proved that said house and improvements upon said land by the said defendant was well worth the sum of one thousand dollars. All of which proof was taken down in writing, and filed for the purpose of transmitting to the General Land Office at Washington, D. C.

That defendant did, at the time his said proof of settlement was so tendered to the said register and receiver, offer in writing to purchase said land, and tendered the receiver of said land office the full purchase price of said tract of land. The said register rejected his proof, and the said receiver refused to accept the purchase money which defendant tendered. And that defendant filed with the said register and receiver at that time an appeal from their decision, refusing to al-

(Indorsement:) John Morrison vs. Samuel Stalmaker. Motion for new trial. Filed July 21st, 1874. D. W. McKinnon, clerk dist. court.

In the district court of 2.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the defendant and moves the court to set aside the verdict and judgment in this cause, and set the same down for a new trial. The request is made by defendant.

T. M. MARQUETT.

134 (Indorsement:) John Morrison vs. Samuel Stalmaker. Motion for an application to enjoin proceedings in this case. Filed March 15, 1875, D. W. McKinnon, clerk, by Wm. L. Wells, clerk.

In the district court of the 2d judicial district in for Cass County, Nebraska.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Now comes the defendant in the above entitled cause and moves the court to restrain proceedings in this cause, for the reason that the said defendant has filed his bill asking that the said plaintiff be declared a trustee. That he holds the land in question in trust for the defendant in this case; and that the said plaintiff be required to deed said land in dispute in this action to defendant; and that the determination of that case will determine this, as will appear by the inspection of the papers therein filed.

Defendant therefore asks that the proceedings in this case be enjoined until the case of Samuel Stalnaker vs. John Morrison be first heard.

CHAPIN & MARQUETT,
Att'ys for Defendant.

135 (Indorsement:) John Morrison vs. Samuel Stalnaker. Answer. Filed March 18th, 1875. D. W. McKinnon, cl'k, by Wm. L. Wells, dep.

In the district court of the 2d judicial district in & for Cass County, Nebraska.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Defendant denies that the plaintiff is entitled to the possession of said land, or that the right of possession is plaintiff's.

Defendant, for further answer to plaintiff's petition, avers that on the 18th day of January, 1871, he settled upon the north half of the northwest quarter of section eighteen (18), township eleven (11) north, range nine (9) east of the principal meridian. That on the 16th day of February, 1871, he made his declaratory statement and filed upon said land,

claiming the same as a pre-emption right. That at the time he so set-
tled upon said land there had been upon the same improvements,
136 to wit, one house, 14 by 16, worth about $200, for which and the
claim the plaintiff gave the sum of $800.

That plaintiff, upon taking possession of said land, did put a base-
ment story under said house worth $150. Defendant also built an addi-
tion to said house; and did, on or about the 16th day of February, 1871,
move into said dwelling-house and upon said real estate, and has ever
since resided upon said land.

Defendant further says that since making said settlement he has
otherwise improved said tract of land by breaking up fifty acres
and by cultivating the same, and has planted upon the same about
4,000 forest trees; and has ever since improved the same, and has dug
a well upon said tract.

That on or about the 14th day of May, 1872, he appeared at the Lincoln
land-office before the register and receiver of said land-office with his
witnesses ready to prove up and show that in all respects he was entitled
to a pre-emption of said land, and was ready and offered to pay for the
same; but the said register & receiver of the said land-office .

That he was ready and offered to prove by two disinterested witnesses
the facts, and did prove the facts as above stated, about defendant's set-
tlement upon said land; and proved by said witnesses that plaint-
137 iff settled upon said land on the 10th day of May, 1871. That he
put upon the same addition to the house that was upon the said
premises, built a bacement, dug a well, and put under cultivation the
greater portion of said land, and had it then under cultivation, and had
resided upon said land ever since the 10th day of May, A. D. 1871.
That he was the head of a family; and that his family resided upon said
land during that time. But the said land-officers refused to allow de-
fendant to prove up and purchase the said land.

That at the time he settled upon said tract of land and filed his de-
clatory statement he had never before had the benefit of the pre-emption
law; had never filed on any tract of land, nor had he ever laid claimed to
any tract of land under the pre-emption law of this State the United
States; and at said time was a citizen of the United States and was
over the age of twenty-one years, and was the head of a family.

All the facts as above stated, and many more such, upon said day
proven by the said defendant by competent witnesses, showing that
he had a right to purchase and pre-empt said land, all of which
138 testimony, as required by law and the regulation of the land de-
partment of this government, is required and filed for the pur-
pose of transmitting to the General Land Office at Washington.

That upon said day the defendant made the necessary oath required
for him to make by law and the regulation of the said land department
to be entitled to pre-empt said tract of land. It was further proved
that said house and improvements upon said land by the said defend-
ant was well worth the sum of one thousand dollars. All of which proof
was taken down in writing, and filed for the purpose of transmitting to
the General Land Office at Washington, D. C.

That defendant did, at the time his said proof of settlement was so
tendered to the said register and receiver, offer in writing to purchase
said land, and tendered the receiver of said land office the full purchase
price of said tract of land. The said register rejected his proof, and
the said receiver refused to accept the purchase money which defend-
ant tendered. And that defendant filed with the said register and re-
ceiver at that time an appeal from their decision, refusing to al-

139 low him to purchase under the pre-emption law the said tract of land, to the Commissioner of the General Land Office. That said papers were suppressed and destroyed, and that defendant never knew that said papers had been so suppressed until after the plaintiff had obtained his patent for said land as hereinafter set forth. That said defendant all this time supposed that said appeal and said papers had been duly sent to the United States Land Commissioner, as was the duty of said register and receiver to do.

Defendant further avers that the said receiver & register never sent a day, as was their duty to do, whereby the said defendant & plaintiff might have had a fair trial before the said land office, and that defendant might have had an opportunity to have shown his right to pre-empt said land, and shown the entire falsity of the destroying, by which plaintiff was allowed to show his right to said land by .

That plaintiff was allowed to make his proofs, as hereinafter set forth, ex parte, and without any knowledge on the part of defendant. That he did so offer said proofs, and defendant did not
140 know the mode and the false and fraudulent means used by plaintiff and those acting with him until plaintiff had obtained the patent to said land. But that on the 26th day of Febr., 1873, the said plaintiff was allowed to appear before said receiver & register, and made the false and fraudulent proofs as hereinafter set forth, and before this defendant knew that said false and fraudulent proofs had been made, and plaintiff had been allowed to commute his said homestead entry to a cash entry; the plaintiff still coming with attempt to swindle def'ts out of his rights, had by bribery, as defendant believes, obtained his patent, which was obtained on the 13' day of May, A. D. 1873.

That on or about the 18th day of February, 1873, defendant made affidavit of the facts existing relative to his settlement upon said land, and also stating therein that plaintiff had not complied with the provisions of the homestead act, and asked that a hearing should be ordered by the register, and he be allowed to prove his said allegations, and offered to file his said affidavit or complaint with the said register and receiver, but was refused a hearing by them for the alleged
141 reason that a complaint or suit was then pending, brought by one , when in fact the complaint alluded to by them was, as they well knew, in the interest of plaintiff to prevent a bona fide contest against his said homestead.

Defendant further says, that the plaintiff in this cause, pretending to lay or enter a homestead claim or entry on said land did on 14' day of May make an entry in the United States land office at Lincoln, Nebraska, claiming said land as a homestead, but never made any settlement whatever upon said land, yet the said plaintiff did without any notice to defendant whatever *did* appear before the said register and receiver of the said land office and made the following false and fraudulent proofs and affidavits. The plaintiff swore in substance, as follows, in order to commute and purchase said tract of land under sec. 8 of the said act giving homestead rights:

That his entry was made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use and benefit of any other person. That said oath was false and fraudulent and untrue, for that plaintiff did not settle or make any bona fide at-
142 tempt to settle upon said land, and never made any attempt to cultivate any portion of said land, and it was untrue that *that* the said purchase was not either directly or indirectly made for the use and benefit of any other person, for he had agreed to deed one-half of

said land to one S. M. Boyd prior to the time he made said oath, and at .

That the said plaintiff did, on the 26' day of Feb., 1873, procure two witnesses or person' whose names were and are unknown to defendant to swear and testify in substance as follows: That the said plaintiff had made a settlement upon said land, and had cultivated the same, and that the only reason why he did not live upon said land longer or all the time was that he was driven from the same by a mob of armed men, and that he was prevented from residing upon said land by fears of violence to his person. They further swore that plaintiff had made improvements upon said land, and had resided upon the same, and that the plaintiff had and would *of* made improvements upon said land sufficient to entitle him to pre empt said tract of land if he had not
143 been driven off the land by an armed mob, and that plaintiff was driven from the land by armed mob. That the said receiver and register of the land office at Lincoln, relying upon this evidence, did allow the said plaintiff to commute his said homestead claim, and purchase the same. Defendant avers that said testimony and affidavits of the said witnesses were false and fraudulent. It was untrue that plaintiff ever made or attempted to make a settlement upon said land, or that he ever attempted to cultivate the said land.

That all of their said testimony was false and untrue, and was made for the purpose of defrauding defendant out of his just rights in the premises. That the plaintiff at the time he so procured said persons to so swear falsely well knew that the said affidavits or testimony was false and untrue, and that he corruptly procured said evidence for the purpose of defrauding defendant out of his right.

That the procuring of said testimony and the making of the same before the land officers of Lincoln was entirely ex parte.

That no notice whatever was ever given to the defendant that
144 the plaintiff would appear before the United States land office at Lincoln on 26' day of Feb., 1873, nor did defendant have any knowledge of the same until long after the same had been so given. That upon these false and fraudulent affidavits or testimony given and made ex parte without any notice to defendant, and in fraud of law, did allow the said plaintiff to commute his said homestead entry to cash.

That at the time the said register & receiver allowed the said plaintiff to commute his said entry that they well knew that said defendant resided upon said land, and that he had taken the proper steps to pre-empt the same, that he was the only bona fide resident of said land; that he was the only person that was at that time a resident of said land; that he was the only person who ever cultivated the said land, and they well knew that his settlement and cultivation was prior to the time plaintiff ever claimed the same.

And defendant submits, under advice of counsel, that it was in violation of law for said register & receiver, knowing what they did, to allow plaintiff, without any notice being given to defendant, to commute
145 his, plaintiff's, said homestead entry to a cash entry, and upon the said false and fraudulent testimony. He submits that said entry so made is null and void, and was made in fraud of the rights of defendant. Plaintiff further submits that the fact that by the fraud and connivance of the said plaintiff and others, by which the said defendant's proof of his settlement upon said land, and the improvements made upon the same by said defendant, and the cultivation of same was suppressed and destroyed, and was not sent to the United States Land Commissioner, although the said defendant, prior to the time the proofs and pa-

pers were so suppressed, the defendant had duly taken an appeal to the said U. S. Land Commissioner and had taken all steps necessary to take said appeal.

That the suppressing of said papers, and the refusal of the said register & receiver to send up said papers and proofs, and make perfect said appeal was a fraud upon plaintiff, and made all acts of the said register and receiver of the said land office null & void. That allowing plaintiff to prove up and commute his said homestead entry without any notice being given defendant made the proceeding null and void,
146 and unconstitutional and of no effect against this defendant.

Defendant therefore prays that the right of property and possession be found to be in defendant, and that the plaintiff be declared a trustee holding said property in trust for the benefit of defendant, and for such other & further relief as justice may require.

THE STATE OF NEBRASKA,
Cass County, ss:

Samuel Stalnaker, being first duly sworn, deposeth & saith that he is the defendant in the case, and that the matters and things set forth in the foregoing answer are true as he believes.

SAMUEL STALNAKER.

Sworn to before me & subscribed in my presence, 18' day of March, 1875.

D. W. McKINNON, *Clerk*,
By WM. L. WELLS, *Deputy*.

147 (Indorsement:) Morrison vs. Stalmaker. Demurrer. Filed March 19, 1875. D. W. McKinnon, clerk, by Wm. L. Wells, dep. Lamb & Billingsley & Whedon for pl'ffs.

THE STATE OF NEBRASKA,
Cass County, ss:

In district court.

JOHN MORRISON, PL'FF,
ag't
SAMUEL STALMAKER, DEF'T.

The said plaintiff demurs to the second defense in the defendant's answer filed herein contained.

LAMB & BILLINGSLEY &
D. H. WHEDON, *for Pl'ff.*

148 (Indorsement:) John Morrison vs. Samuel Stalmaker. Stipulation for a change of venue to Lancaster County. Filed March 19, 1875. D. W. McKinnon, clerk, by Wm. L. Wells, deputy.

THE STATE OF NEBRASKA,
Cass County, ss:

In district court.

JOHN MORRISON, PLAINTIFF,
against
SAMUEL STALMAKER, DEFENDANT.

Stipulation.

It is hereby stipulated and agreed by and between the said plaintiff

and the said defendant in open court that an order shall be made in this cause changing the venue in the said cause to Lancaster County, Nebraska, sufficient cause therefor satisfactorily to said parties appearing to them, and the said parties hereby waive all errors or irregularities in said transfer and change of venue in said cause, as above stipulated. The costs thereof to abide the event of said suit.

LAMB & BILLINGSLEY &
D. H. WHEDON,
Att'ys for said Plaintiff.

149 W. F. CHAPIN,
Attorney for said Defendant.

(Indorsement:) Morrison vs. Stalnaker. Jour. entry. Filed March 19, '75. D. W. McKinnon, clerk, by Wm. L. Wells, deputy.

In district court, Cass County, Nebraska.

JOHN MORRISON, PLAINTIFF,
against
SAMUEL STALNAKER, DEFENDANT.

This cause came on for hearing on the motion of the said plaintiff for a change of venue in the said action; is argued by counsel and considered by the court, on consideration whereof it is considered and ordered by the court (both of the said parties being present and consenting thereto) that the said motion is granted, and the place of trial of the said action is changed to Lancaster County, Nebraska, no objection being made to a change to said county.

150 Afterwards, to wit, May 10th, A. D. 1875, was filed in the office of Wm. A. Sharrar, clerk of the district court within and for Lancaster County, Nebraska, a copy of order for change of venue, &c., &c., which is in the words and figures following, to wit:

(Indorsement:) E, 155. #1351. John Morrison vs. Samuel Stalnaker. Copy of order for change of venue to Lancaster County court. Statement of costs in Cass County court. Filed May 10, 1875. W. A. Sharrar, cl'k, D. C., by J. P. Hebard, deputy.

In district court, second judicial district of Nebraska, within and for Cass County.

Be it remembered that heretofore, to wit, at the March term, A. D. 1875, of the district court aforesaid, the following officers of court being present, to wit:

151 Hon. Geo. B. Lake, judge; Wm. L. Wells, deputy clerk, and M. B. Cutter, sheriff.

And court being opened in due form on the 19th day of March, 1875, the following entry was made in journal book "D," at page 390, to wit:

JOHN MORRISON
vs.
SAMUEL STALNAKER. } No. 27.

This cause came on this day to be heard upon the demurrer herein

filed to the 2d count of the amended answer, and was argued by counsel. Whereupon the court, being well advised in the premises, doth overrule said demurrer.

And thereupon this cause came on for hearing upon the motion of the said plaintiff for a change of venue in the said action, & is argued by counsel and considered by the court, on consideration whereof it is considered and ordered by the court (both of the said parties being present and consenting thereto) that the said motion is granted, and the place of trial of the said action is changed to Lancaster County, Nebraska.

No objection being made to said change in said county.

(Signed)

Judge.

152 STATE OF NEBRASKA,
Cass County, ss:

I, D. W. McKinnon, clerk of the district court in and for said county, do hereby certify that the above and foregoing is a true copy of the order charging the venue in the aforesaid cause.

In witness whereof I hereunto set my hand and the seal of said court at Plattsmouth this 10th day of May, A. D. 1875.

D. W. McKINNON, *Clerk*,
By C. P. MOORE, *Deputy.*

Costs in Cass County court, $13.83.
" of transmittal to Lancaster County and copy of order of change, .75—$14.58.
The above is a correct statement of costs.
[SEAL.]

D. W. McKINNON, *Clerk*,
By C. P. MOORE, *Deputy.*

Afterwards, to wit, Jan. 5th, 1876, being a day in adjourned November term, 1875, of the d. c. of Lancaster County, Nebraska, this cause came on for hearing, and was disposed of in the words and figures following, as found in court journal C, page 197, to wit:

JOHN MORRISON
vs.
SAMUEL STALNAKER. } 1351. E, 155.

Leave to reply in ten days.

153 Afterward, to wit, January 17th, 1876, was filed in the office of the clerk of the court an answer, which is in the words & figures following, to wit:

(Indorsement:) John Morrison vs. Samuel Stalnaker. Answer. Consent given to file. Lamb & Billingsley, pl'ff's att'ys. Filed Jan'y 17th, 1876. Wm. A. Sharrar, Cl'k D. C.

In the district court of the 2d judicial district of Nebraska, within and for Cass County.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

Defendant denies that the plaintiff is entitled to the possession of said land, or that the right of possession is in plaintiff; denies that the

plaintiff has been damaged to the sum of $1,000 *dollars*, or any other amount, by defendant's refusing to surrender to plaintiff the pos-
154 session of said land described in his petition. Defendant, for further answer to plaintiff's petition, avers that on the 18th day of January, 1871, he settled upon the north half of the northwest quarter of section eighteen (18), in township No. eleven (11) north of range No. nine (9) east of the 6th principal meridian in Nebraska. That on the 16th day of February, A. D. 1871, he made his declaratory statement and filed upon said land, claiming the same as a pre-emption right. That at the time he so settled upon said land there had been put upon the same improvements as follows, viz:

One house, 14x16, worth about $200, for which, and the claim, the defendant gave the sum of $800. That defendant, upon taking possession of said land, did put a basement story under said house worth $150. Defendant also built an addition to said house, and did, on or about the 16th day of February, 1871, move into said dwelling-house and upon said real estate, and has ever since resided upon said land. Defendant further says that since making said settlement he has otherwise improved said tract of land by breaking up fifty acres and by cultivating the same, and has planted upon the same about $4,000 forest trees, dug
155 a well upon said land, and ever since otherwise improved the same. That on or about the 16th day of May, 1872, he appeared at the Lincoln land office, before the register and receiver of said land office, with his witnesses, ready to prove up and show that in all respects he was entitled to a pre-emption of said land, and was ready and offered to pay for the same to the said register or receiver of the said land office.

That he was ready and offered to prove by two disinterested witnesses the facts, and did prove the facts as above stated about defendant's settlement upon said land, and proved by said witnesses that defendant settled upon said land about the 16th day of February, 1871; that he put upon the same an addition to the house that was upon said premises, built a basement, dug a well, and put under cultivation the greater part of said land and had it then under cultivation, and had resided upon said land ever since on or about the 16th of February, 1871; that he was the head of a family, and that his family resided upon said land during that time. But the said officers refused to allow said defendant to prove up and purchase said land; that at the time he settled upon said land and filed his declaratory statement
156 therefor he had never before had the benefit of the pre-emption law, had never filed on any tract of land, nor had he ever laid claim to any tract of land under the pre-emption law of the United States, and at said time was a citizen of the United States and was over the age of twenty-one years, and was the head of a family; that he did not own three hundred and twenty acres of land in any State or Territory of the United States, and that he did not remove from his own land in the State of Nebraska to settle upon the said tract, and that he was in all respects qualified and entitled to enter said land under the pre-emption law. All these facts as above stated and many more such were upon said day proven by the said defendant by competent witnesses, showing that he had a right to purchase said land as a pre-emptor. All of which testimony, as required by law and the regulations of the land department of this government, was filed for the purpose of being transmitted to the General Land Office at Washington. That upon said day defendant made the necessary oath or affidavit required to be made by law and the regulations of the land department to be en-

the only person that was at that time a resident on said land; that he was the only person who ever cultivated the said land; and they well knew that his settlement and cultivation was prior to the time plaintiff ever claimed the same. And defendant submits, under advice of counsel, that it was in violation of law for said register and receiver, knowing what they did, to allow plaintiff, without any notice being given to defendant, to commute his (plaintiff's) homestead entry to a cash entry, and upon the said false and fraudulent testimony. He submits that said entry so made is null and void, and was made in fraud of the rights of defendant. Plaintiff further submits, that the fact that by the fraud and connivance of the said plaintiff, and others, by which the said defendant's
164 proof of his settlement upon said land, and the improvements made upon the same by said defendant, and the cultivation by same was suppressed and destroyed, and was not sent to the United States Land Commissioners, although this said defendant, prior to the time his proofs and papers were so suppressed, the defendant had duly taken and appealed to the said U. S. Land Commissioner, and had taken all steps necessary to take said appeal. That the suppression of said paper and the refusal of said register & receiver to send up said papers and proofs, and make perfect said appeal, was a fraud upon plaintiff, and made all acts of the said register and receiver of the said land office null & void. That allowing plaintiff to prove up and commute his said homestead entry, without any further notice being given to defendant, made the proceeding null and void, and unconstitutional, and of no effect as against this defendant. Defendant, therefore prays, that the right of property and possession may be found to be in defendant, and that the plaintiff be declared a trustee, holding said property in trust for the benefit of defendant; and for such other &
165 further relief as justice may require.

SAMUEL STALNAKER,
By T. M. MARQUETTE,
W. F. CHAPIN.
Att'ys.

STATE OF NEBRASKA,
Lancaster County, ss:

Samuel Stalnaker, defendant in the foregoing action, being first duly sworn, says that the facts set forth in the foregoing answer are, as he verily believes, true.

SAMUEL STALNAKER.

Subscribed in my presence, and sworn to before me, this 11th day of January, 1876.

GEO. A. WATSON,
[SEAL.] *Notary Public.*

166 Afterward, to wit, January 24th, 1876, was filed in the office of the clerk of the court a demurrer, which is in the words and figures following, to wit:

(Indorsement:) E ⅋155 ⅋1351. John Morrison vs. Samuel Stalnaker. Demurrer. Filed Jan'y 24th, 1876. Wm. A. Sharrar, cl'k D. C., by A. D. Burr, deputy. Lamb & Billingsley, pl'ff's att'ys.

THE STATE OF NEBRASKA,
Lancaster County, ss:

In district court.

JOHN MORRISON, PLAINTIFF,
ag't
SAMUEL STALNAKER, DEFENDANT.

Now comes the plaintiff and demurs, and says:
1st. The several matters and things set up in the said pretended second defense of said defendant's answer filed herein (Jan. 17, 1876)
167 do not in law constitute any defense to the claim of said plaintiff. 2nd. That the said several matters and things set up—the said second pretended defense in the said defendant's answer contained, including in the 1st, 2d, 3d & 4th pages, & 1st half of 5th page of said defendant's answer, do not in law constitute any defense the plaintiff's petition. 3d. That said several matters and things set up on the last half of page 5, and on first & second line of 6th page of said answer, do not in law constitute any defense in said action. 4th. That the several matters and things set up on the 6th page of the said answer do not in law constitute any defense in said action. 5th. That the several matters and things set up in the 7th, 8th, 9th & 10th pages of said defendant's answer do not in law constitute any defense to the said action. 6th. That all the matters contained in the said answer, after the 10th page thereof, do not in law constitute any defense to the petition
168 of the plaintiff filed therein. 7th. That all the matters alleged in the said answer, after the 1st three lines thereof, do not in law constitute any defense to the petition of the plaintiff. 8th. That the matters contained in the said answer do not in law constitute any defense to said plaintiff's petition.

LAMB & BILLINGSLEY,
Plaintiff's Att'ys.

Afterward, to wit, May 2d, 1876, being the second day of the May term, 1876, of this court, this cause came on for hearing, and was disposed of in the words and figures following, as found in court journal "C," page 452, to wit:

JOHN MORRISON
vs. 1351. E, 155.
SAMUEL STALNAKER.

This cause comes on to be heard on demurrer of plaintiff to the answer of defendant. After consideration thereof by the court, it is ordered by the court that the said demurrer be and the same is hereby overruled; and the plaintiff has leave to file reply by Monday morning next.

169 Afterward, to wit, September 8th, A. D. 1876, was filed in the office of the clerk of this court a reply, which is in the words and figures following, to wit:

(Indorsement:) John Morrison vs. Samuel Stalnaker. Reply. Consent given to file this reply this day of Sept., A. D. 1876.
att'ys for def't. E, 155. ℔ 1351. Filed Sept. 8th, 1876. Wm. A. Sharrar, cl'k D. C. Lamb, Billingsley & Lambertson and C. C. Burr, att'ys for pl'ff.

Reply.

In the district court of the 2d judicial district of Nebraska, held within and for Lancaster County.

JOHN MORRISON, PLAINTIFF,
vs.
SAMUEL STALNAKER, DEFENDANT.

And now comes the above named plaintiff, and for a reply to the amended answer of the above named defendant, filed in this action, says:

170 I. That as to whether the said defendant did on or about the 18th day of January, A. D. 1871, settle on the land in his answer and in plaintiff's petition described; or that at said time there had been put upon said land the improvements mentioned in defendant's answer, or that said defendant paid the sum of $800.00 therefor; or that said defendant put a basement story under said house worth $150.00; or that said defendant built an addition to said house and moved into the same on or about the 16th day of February, A. D. 1871; or that said defendant has ever since resided on said land; or that he has broken and cultivated 50 acres of the same, dug a well thereon, and planted about 4,000 trees, or otherwise improved said land; or that on or about the 16th day of May, A. D. 1872, defendant appeared at the land office at Lincoln, Nebraska, before the register and receiver with witnesses ready to prove up and pay for said land under the pre-emption act; or that he did then and there prove the facts as stated in said defendant's answer; or that the said register and receiver refused to allow the said defendant to prove up and purchase said land; or that said de-

171 fendant on said day made the necessary oath or affidavit required by law; or that said improvements of defendant were worth $1,000.00; or that said proof was taken down in writing for the purpose of being transmitted to Washington, D. C.; or that said defendant at that time offered in writing to purchase said land; or that he then and there tendered to the receiver of said land office the full purchase price for said land, or that the said receiver refused to receive the money tendered for the same, or that said register & receiver rejected defendant's said proof; or that said defendant did then and there appeal from said decision of said register and receiver; or that said appeal was made in writing and filed with the register and receiver to be by them transmitted to the General Land Office at Washington, D. C., or that said papers were suppressed or destroyed; or that said defendant did not know of the same until said plaintiff had received his patent for said land, or that said defendant supposed that said papers had been sent to the Commissioner of the General Land Office as was the duty of said register and receiver to do, or that said register & receiver never set a day for a hearing in said case as alleged in defendant's answer;

172 or that on or about the 18th day of February, A. D. 1873, defendant made and verified an information or complaint in the United States land office at Lincoln, Nebraska, in the form prescribed by the Commissioner of the General Land Office, setting forth the facts as alleged in said defendant's answer, and offered to file said complaint before said register & receiver, and was refused a hearing by them because for the alleged reason that a suit was then pending by one ; or that said register & receiver then well knew that the complaint alluded to was filed in the interest of this plaintiff by one of his friends to

prevent a bona fide contest against plaintiff's entry; or that said register and receiver well knew at that time that defendant was residing on said land or that he had taken the proper steps to pre-empt the same, or that they knew that said defendant was the only bona fide resident on said land or that he was the only person who ever cultivated the same. or that his settlement and cultivation was prior to the time plaintiff ever claimed the land, or that defendant had no knowledge of plaintiff's intention to commute on February 26, 1872, until after it had
173 been done, the said plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

II. And the said plaintiff, for a further reply to said defendant's answer, says that he denies that on the 26th day of February, A. D. 1873, or at any other time he was allowed to or did make any false and fraudulent proofs at the United States land office at Lincoln, Nebraska, as alleged in said defendant's answer; denies that he has connived with others to swindle defendant out of his rights, or has ever attempted to swindle defendant in any manner whatever; denies that he has wrongfully and by undue means, or in any other manner, except that provided by law, obtained a patent for said land; denies that he ever made any settlement on said land; denies that he appeared at the said land office, before the register & receiver, and submitted any false or fraudulent proofs whatever, but avers the truth to be that all of the proofs submitted by plaintiff at the land office, which is alleged if defendant's answer as false and fraudulent are in all respects true; denies that he ever attempted or intended to make any permanent or bona fide settlement on said land; denies that no violence was
174 offered or intended and that no threats were made against him; denies that he was not in danger at any time of bodily harm at the hands of the defendant or his friends, or at the hands of any mob of persons; denies that the affidavits and testimony of the witnesses adduced by plaintiff to commute his said homestead entry, no the 26th day of February, A. D. 1873, was false and fraudulent, but avers the truth to be, that all of said testimony and affidavits furnished by plaintiff, and set forth in defendant's answer as false and fraudulent, is true; denies that he never intended or attempted to erect any dwelling-house on said land, and that he never attempted to cultivate the same, but alleges the truth to be, that he used all legal means and made every effort to do both, and was prevented from so doing by the violence and threats of the said defendant and a mob of his friends and relatives, numbering from 10 to 20 individuals, who forcibly and violently ejected plaintiff and his family and those in plaintiff's employ from said land; threatened to kill and drown plaintiff and others, if they ever returned to said premises & otherwise prevented plaintiff from complying with the letter of the homestead law; denies that all of
175 said testimony was untrue, and was made for the purpose of defrauding defendant out of his just rights in the premises, or of defrauding defendant in any other manner; denies that he corruptly procured said evidence for the purpose of defrauding said defendant out of his rights; denies that said proof was furnished in fraud of law; denies that it was in violation of law for said register & receiver to allow plaintiff without notice to defendant to submit proof of his claim to said land, and denies that plaintiff's homestead entry is null & void, and in fraud of the rights of the defendant.

III. And the said plaintiff, further replying to the said answer of defendant, says that heretofore, to wit, on the 14th day of May, A. D. 1872, at the United States land office at Lincoln Nebraska, this

Reply.

In the district court of the 2d judicial district of Nebraska, held within and for Lancaster County.

JOHN MORRISON, PLAINTIFF,
vs.
SAMUEL STALNAKER, DEFENDANT.

And now comes the above named plaintiff, and for a reply to the amended answer of the above named defendant, filed in this action, says:

170 I. That as to whether the said defendant did on or about the 18th day of January, A. D. 1871, settle on the land in his answer and in plaintiff's petition described; or that at said time there had been put upon said land the improvements mentioned in defendant's answer, or that said defendant paid the sum of $800.00 therefor; or that said defendant put a basement story under said house worth $150.00; or that said defendant built an addition to said house and moved into the same on or about the 16th day of February, A. D. 1871; or that said defendant has ever since resided on said land; or that he has broken and cultivated 50 acres of the same, dug a well thereon, and planted about 4,000 trees, or otherwise improved said land; or that on or about the 16th day of May, A. D. 1872, defendant appeared at the land office at Lincoln, Nebraska, before the register and receiver with witnesses ready to prove up and pay for said land under the pre-emption act; or that he did then and there prove the facts as stated in said defendant's answer; or that the said register and receiver refused to allow the said defendant to prove up and purchase said land; or that said de-

171 fendant on said day made the necessary oath or affidavit required by law; or that said improvements of defendant were worth $1,000.00; or that said proof was taken down in writing for the purpose of being transmitted to Washington, D. C.; or that said defendant at that time offered in writing to purchase said land; or that he then and there tendered to the receiver of said land office the full purchase price for said land, or that the said receiver refused to receive the money tendered for the same, or that said register & receiver rejected defendant's said proof; or that said defendant did then and there appeal from said decision of said register and receiver; or that said appeal was made in writing and filed with the register and receiver to be by them transmitted to the General Land Office at Washington, D. C., or that said papers were suppressed or destroyed; or that said defendant did not know of the same until said plaintiff had received his patent for said land, or that said defendant supposed that said papers had been sent to the Commissioner of the General Land Office as was the duty of said register and receiver to do, or that said register & receiver never set a day for a hearing in said case as alleged in defendant's answer;

172 or that on or about the 18th day of February, A. D. 1873, defendant made and verified an information or complaint in the United States land office at Lincoln, Nebraska, in the form prescribed by the Commissioner of the General Land Office, setting forth the facts as alleged in said defendant's answer, and offered to file said complaint before said register & receiver, and was refused a hearing by them because for the alleged reason that a suit was then pending by one ; or that said register & receiver then well knew that the complaint alluded to was filed in the interest of this plaintiff by one of his friends to

prevent a bona fide contest against plaintiff's entry; or that said register and receiver well knew at that time that defendant was residing on said land or that he had taken the proper steps to pre-empt the same, or that they knew that said defendant was the only bona fide resident on said land or that he was the only person who ever cultivated the same, or that his settlement and cultivation was prior to the time plaintiff ever claimed the land, or that defendant had no knowledge of plaintiff's intention to commute on February 26, 1872, until after it had
173 been done, the said plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

II. And the said plaintiff, for a further reply to said defendant's answer, says that he denies that on the 26th day of February, A. D. 1873, or at any other time he was allowed to or did make any false and fraudulent proofs at the United States land office at Lincoln, Nebraska, as alleged in said defendant's answer; denies that he has connived with others to swindle defendant out of his rights, or has ever attempted to swindle defendant in any manner whatever; denies that he has wrongfully and by undue means, or in any other manner, except that provided by law, obtained a patent for said land; denies that he ever made any settlement on said land; denies that he appeared at the said land office, before the register & receiver, and submitted any false or fraudulent proofs whatever, but avers the truth to be that all of the proofs submitted by plaintiff at the land office, which is alleged if defendant's answer as false and fraudulent are in all respects true; denies that he ever attempted or intended to make any permanent or bona fide settlement on said land; denies that no violence was
174 offered or intended and that no threats were made against him; denies that he was not in danger at any time of bodily harm at the hands of the defendant or his friends, or at the hands of any mob of persons; denies that the affidavits and testimony of the witnesses adduced by plaintiff to commute his said homestead entry, no the 26th day of February, A. D. 1873, was false and fraudulent, but avers the truth to be, that all of said testimony and affidavits furnished by plaintiff, and set forth in defendant's answer as false and fraudulent, is true; denies that he never intended or attempted to erect any dwelling-house on said land, and that he never attempted to cultivate the same, but alleges the truth to be, that he used all legal means and made every effort to do both, and was prevented from so doing by the violence and threats of the said defendant and a mob of his friends and relatives, numbering from 10 to 20 individuals, who forcibly and violently ejected plaintiff and his family and those in plaintiff's employ from said land; threatened to kill and drown plaintiff and others, if they ever returned to said premises & otherwise prevented plaintiff from complying with the letter of the homestead law; denies that all of
175 said testimony was untrue, and was made for the purpose of defrauding defendant out of his just rights in the premises, or of defrauding defendant in any other manner; denies that he corruptly procured said evidence for the purpose of defrauding said defendant out of his rights; denies that said proof was furnished in fraud of law; denies that it was in violation of law for said register & receiver to allow plaintiff without notice to defendant to submit proof of his claim to said land, and denies that plaintiff's homestead entry is null & void, and in fraud of the rights of the defendant.

III. And the said plaintiff, further replying to the said answer of defendant, says that heretofore, to wit, on the 14th day of May, A. D. 1872, at the United States land office at Lincoln Nebraska, this

plaintiff made homestead entry, numbered 10,799, under and by virtue of the homestead act of the Congress of the United States, approved May , 1862, and the acts amendatory thereof, covering the tract of land in defendant's answer described; that on said last named date said tract of land was vacant, unappropriated land belonging to the
176 Government of the United States, & was subject to the operation of said acts; that this plaintiff was and is in all respects a qualified homesteader; that he performed all acts necessary on his part to be done and performed to entitle him to make said entry.

That he has in every particular complied with the requirements of said act of Congress, except when prevented from so doing by the force, violence, and threats of the said defendant, and that on the 13th day of May, A. D. 1873, there was issued to him by the Government of the United States a patent conveying to this plaintiff the said tract of land in his petition described.

Wherefore the said plaintiff asks judgment as prayed for in his petition.

LAMB, BILLINGSLEY & LAMBERTSON AND
C. C. BURR, *Att'ys for Pl'ff.*

STATE OF NEBRASKA,
Lancaster County, ss:

John Morrison, being first duly sworn, on his oath says:

That he is the plaintiff in the foregoing-entitled action;

That he has heard the foregoing reply read, & that the facts therein set forth are, as affiant believes, true.

177 JOHN MORRISON.

Subscribed in my presence & sworn to before me this 6th day of Sept., 1876.

A. D. BURR,
Dep. Cl'k D. C.

Afterwards, to wit, Oct. 27th, 1876, was filed in the office of the clerk of this court a precipe for subpœna, which is in the words and figures following, to wit:

(Indorsement:) John Morrison vs. Samuel Stalnaker. Precipe subpœna # 1351. E, 155. Filed Oct. 27th, 1876. Wm. A. Sharrar, cl'k D. C., by A. D. Burr, dep. Lamb, B., & L. & C. C. Burr, for pl't'ffs.

Precipe.

In dis'ct c't in & for Lanc. Co., Neb.

JOHN MORRISON }
vs. }
SAMUEL STALNAKER. }

The clerk will please issue a subpœna for Jos. B. McDowell,
178 commanding him to bring with him tract-book vol. 5, town. 11, R. 9 E.; also Commissioner's letters dated Feb. 3, 1866, & March 1, 1867, both relating to lands of B. & M. R. R., to be and appear at court-room with said papers & book on Tuesday, Oct. 31, 1876, at 9 a. m., on the part of plaintiff.

C. C. BURR,
Att'y for Pl'ff.

Afterward, to wit, October 31st, 1876, was filed in the office of the clerk of this court a subpœna previously issued out of said court, which is in the words and figures following, to wit:

(Indorsement:) Subpœna. District court. John Morrison, plaintiff. Samuel Stalnaker, defendant. Lamb, B. & L. and C. C. Burr, pl'ff's attorneys. Filed Oct. 31st, 1876. Wm. A. Sharrar, clerk. # 1351. E, 155.

179 THE STATE OF NEBRASKA,
Lancaster County, ss:

The State of Nebraska to the sheriff of said county, greeting:

You are hereby commanded to summon Jos. B. McDowell, esq. (to bring with him tract-book vol. 5, town. 11, R. 9 E.; also Commissioner's letters dated Feb. 3d, 1866, & March 1, 1867, both relating to lands of B. & M. R. R.), to appear before the district court in said county on the 31st day of October, at 9 o'clock a. m., to give evidence in a suit between John Morrison, plaintiff, and Samuel Stalmaker, defendant, on the part of the said plaintiff; and this you shall in nowise omit, under the penalty of the law. And have you then and there this writ.

Witness my hand and seal of said court this 27th day of October, A. D. 1876.

[SEAL.] WM. A. SHARRAR, *Clerk*,
By A. D. BURR, *Deputy*.

Oct. 31st, 1876. I served the within writ on the within-named J. B. McDowell by delivering to him a true copy of the same.

Fees, 65 cts.

SAM. McCLAY, *Sh'ff*,
By J. S. HOAGLAND, *Deputy*.

180 Afterward, to wit, Nov. 1st, 1876, being the 26th day of the October term, 1876, of this court, this cause came on for hearing and was disposed of in the words and figures following, as found in court journal "D," page 170, to wit:

JOHN MORRISON
vs. } 1351. E. 155.
SAMUEL STALNAKER.

This cause comes on to be heard, and trial was had to the court. After argument by counsel the case was submitted to the court.

Afterward, to wit, Monday, Nov. 6, 1876, being a day in an adjourned October term, 1876, of this court, this came on for further hearing and was disposed of in the words & figures following, as found in court journal "D," page 184, to wit:

JOHN MORRISON.
vs. } 1351. E. 155.
SAMUEL STALNAKER.

This cause comes on to be heard upon the pleadings and the evidence, and having been heretofore argued by counsel and submitted to the

court for consideration, to wit, on the 1st day of November,
181 A. D. 1876, this being one of the days in the regular October, A. D. 1876, term of this court, and now on consideration thereof the court doth find the issues joined in favor of the plaintiff, and assess the damages of the said plaintiff at the sum of three hundred and fifty dollars. It is therefore considered by the court that the said plaintiff do have and recover of and from the said defendant the said sum of three hundred and fifty dollars. And it is further considered by the court that the plaintiff has a legal estate in, and is entitled to the immediate possession of, the real property described in the petition, and that the defendant unlawfully keeps him out of the same. It is therefore considered and decreed by the court that the said John Morrison recover from the said Samuel Stalnaker the real property described in the petition, to wit:

The north half of the northwest quarter of section eighteen (18) in township eleven (11) north of range nine (9) east, lying in Cass County, in the State of Nebraska, and also the said sum of three hundred and fifty dollars, his said damages, together with his costs herein expended. And it is ordered that a writ issue to the sheriff of Cass County, commanding him to put the said plaintiff in possession of the said premises.

182 To which ruling of the court the defendant, by his attorneys, duly except.

Afterward, to wit, Nov. 8th, A. D. 1876, was filed in the office of the clerk of this court a motion for new trial, which is in the words & figures following, to wit:

(Indorsement:) John Morrison vs. Samuel Stalnaker. Motion for new trial. Filed Nov. 8th, '76. Wm. A. Sharrar, cl'k D. C., by A. D. Burr, dep.

Motion for new trial.

In the district court of 2d judicial district in & for Lancaster County.

JOHN MORRISON
vs.
SAMUEL STALNAKER.

And now comes the said Samuel Stalnaker by T. M. Marquett & W. F. Chapin, his attorneys, and moves the court here for a new trial in this action for the following reasons, to wit: 1. That the decision given in this case by the judge of said court is against and contrary to the weight of evidence and the law of the case. 2nd. That said court gave judgment for the plaintiff, when by the evidence and law in the
183 case he ought to have given for the defendant.

Defendant therefore asks that a new trial be granted in this case.

COBB, MARQUETT & MOORE,
WM. F. CHAPIN,
Atty's for Defendant.

Afterward, to wit, November 10th, A. D. 1876, being a day in an adjourned October term, 1876, of this court, this cause came on for hearing and was disposed of in the words & figures following, as found in court journal D, page 198:

JOHN MORRISON
vs. } 1351. E, 155.
SAMUEL STALNAKER.

This cause comes on to be heard upon the motion of the defendant, by his attorney, for a new trial herein.

After argument by counsel, it is considered by the court that the said motion be, and the same hereby is, overruled.

To which ruling of the court the defendant, by his attorney, duly excepts.

Afterward, to wit, Nov. 28th, A. D. 1876, was filed in the office of the clerk of this court a precipe for execution in the words & figures following, to wit:

184 (Indorsement:) John Morrison vs. Samuel Stalnaker. Precipe. Filed Nov. 28th, '76. Wm. A. Sharrar, cl'k D. C., by A. D. Burr, dep. Lamb & Billingsley & C. C. Burr, for pl'ffs.

Precipe.

In district court.

THE STATE OF NEBRASKA,
Lancaster County, ss:

JOHN MORRISON.
vs. }
SAMUEL STALMAKER.

The clerk of said court will issue execution in the said action for the recovery of the said premises, and for the said damages and costs.

LAMB & BILLINGSLEY &
C. C. BURR, *for Pl'ff.*

To CASS CO.

Afterward, to wit, Dec. 18th, 1876, being a day in an adjourned October term, 1876, of this court, this cause came on to be heard, and was disposed of in the words & figures following, as found in court journal D, page 212:

JOHN MORRISON
vs. } 1351. E, 155.
SAMUEL STALMAKER.

185 And now comes the said defendant and presented his certain bill of exceptions, taken on the trial of this cause, and the same is allowed and signed and ordered to be placed on file with the pleadings, and made a part of the record in this case.

Afterward, to wit, Jan. 27th, A, D. 1877, was returned and filed in the office of the clerk of this court, an execution previously issued out of said court, which is in the words & figures following, to wit:

(Indorsement:) E. ℔ 155. ℔ 1351. Execution, C. ℔ 206. District court. John Morrison, plaintiff, vs. Sam'l Stalnaker, defendant. Lamb & Billingsley & C. C. Burr, plaintiff's attorneys. Return and filed Jan. 27th, 1877. Wm. A. Sharrar, clerk.

THE STATE OF NEBRASKA,
Lancaster County, ss:

The State of Nebraska to the sheriff of Cass County, greeting:

Whereas judgment has been rendered on the 6th day of November, A. D. 1876, in an action in the district court for said county, between John Morrison, plaintiff, and Samuel Stalnaker, in favor of the said John Morrison, and against the said Samuel Stalnaker, for the recov-
186 ery of the premises of the north half of the northwest quarter of section No. eighteen (18), town. eleven (11), range nine (9) east of the 6th p. m., in Cass County, Nebraska, and for the recovery of the sum of $350.00 damages for the withholding the same, with costs taxed at $33.36.

Therefore, we command you that you deliver to the said plaintiff the possession of the said property—the N. ½ of the NW. ¼ of section 18, town. 11, range 9 east, in Cass County, Nebraska—and that you cause to be levied of the goods and chattels in your bail'wick of Samuel Stalnaker the said sum of $350.00 judgment, with interest on the same from November 6th, 1876, and costs, $33.36; and also the further sum of $1.75 costs of increase on said judgment, and the accruing costs; and, for want of goods and chattels, that you cause the same to be levied of the lands and tenements in your bail'wick of the said Samuel Stalnaker, and of your doings make due return into the district court within 60 days of the manner in which you have executed this writ endorsed thereon.

Witness my hand and the seal of said court at Lincoln, Lancaster County, Nebraska, this 29th day of November, A. D. 1876.

(SEAL.) WM. A. SHARRAR,
Clk D. C.,
By A. D. BURR, *Dep.*

187 I received this execution at 4 p. m. on the 30th day of November, A. D. 1876, and I return the same unsatisfied, by direction of attorney for plaintiff.

M. B. CUTLER,
Sheriff Cass Co., Neb.

Fees for mileage, $5.60.

STATE OF NEBRASKA,
Lancaster County, ss.:

I, Wm. A. Sharrar, cl'k of the D. C. in and for said county & State, do hereby certify that the above & foregoing is a true and correct copy of the pleadings and journal entries and bill of exceptions on file and of record in my office, in a case in said court wherein John Morrison is plaintiff and Samuel Stalmaker is defendant.

Witness my hand & seal of said court, by me affixed, at Lincoln, this 28th day of April, A. D. 1877.

[SEAL.] WM. A. SHARRAR,
Clk D. C., Lancaster County, Nebraska.

188 And afterwards, to wit, upon the nineteenth day of December, A. D. 1877, the same being one of the days of the October term, A. D. 1877, the following proceedings were had and done in said cause as appears of record in journal B, at page 425, to wit:

SAMUEL STALNAKER
v. } Error from Lancaster.
JOHN MORRISON.

This cause came on to be heard, was taken up and argued by coun-

sel and submitted to the court, and the court being now here fully advised in the premises, it is now here considered by the court that the judgment of the district court for Lancaster County should be, and the same hereby is, reversed at costs of defendant in error, taxed at $100.44.

And it is further ordered by the court that the plaintiff pay to the clerk of this court, for the defendant, within ninety days, the amount paid by him for entering the land in controversy, with interest to the date of payment, and that thereupon the defendant shall convey the legal title to the plaintiff of the following lands, to wit, the north half of the northwest quarter of section eighteen, in township eleven, north of range nine east of the sixth principal meridian, in Cass County, Nebraska, or, in default thereof, that this decree shall stand in place of and have the same effect as if said deed had been executed by the defendant in error, John Morrison.

189 And on the same day, to wit, the 19th day of December, A. D. 1877, being one of the days of the October term, 1877, the following opinion was filed in said cause.

MAXWELL, J.

On the 18th day of January, 1871, the plaintiff in error settled upon a tract of land, in Cass County, belonging to the United States, and on the sixteenth day of February following, filed with the register of the proper land office his declaratory statement of his intention to pre-empt the same. The tract of land in question was within the grant of land from the United States to the B. & M. R. R. Co., and had been offered at public sale prior to the passage of the act making the grant aforesaid, but at the date of said settlement and of filing the declaratory statement, it was not subject to private entry. The plaintiff from the time of settlement until now has resided upon and cultivated said land, and has made valuable improvements thereon. It appears from the record that the plaintiff did not make the proof required, as to qualification, settlement, and cultivation, until about the 1st day of June, 1872, at which time he appeared at the proper land office with his witnesses, and offered to prove all the facts necessary to entitle him to enter said land, and offered to pay the sum of money required to enter the same, but the register and receiver refused to permit him to enter said land,

190 holding that by reason of his failure to prove up within one year from the date of settlement, he had forfeited the same. The defendant in error now holds the legal title to the land, and in an action of ejectment recovered judgment against the plaintiff in error for the possession thereof, to reverse which the plaintiff brings the case into this court by petition in error.

Section 2264 of the Revised Statutes of the United States provides that, when any person settles or improves a tract of land, subject at the time of settlement to private entry, and intends to purchase the same, under the preceeding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district, a written statement describing the land settled upon, and declareing his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. Sections 2265 and 2266 require the claimant to file his application within three months from the date of settlement. Section 2267 provides that all claimants of pre-emption rights under the two preceeding

sections shall, when no shorter period is prescribed by law, make the proper proof and payment for the land claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired. On the 6th day of March, 1868, Congress passed an act providing that nothing in the act approved July 1st, 1862, entitled an act to aid in the construction of a railroad and telegraph
191 line from the Missouri River to the Pacific Ocean, and to secure the government the use of the same for postal, military and other purposes, and the acts amendatory thereof shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even-numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located, provided that such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those laws; and the Secretary of the Interior be and he is hereby authorized and directed to restore to homestead settlements, pre-emption or entry, according to existing laws, all the even numbered sections of land belonging to the government and now withdrawn from market on both sides of the Pacific Railroad and branches wherever said road and branches have been definitely located. The B. & M. R. R. extension is one of the branches referred to in the above act, and the lands within the limit of the grant belonging to the United States are not subject to private entry, and were not at the time the plaintiff settled upon the land in dispute. It is only in cases where lands are subject to private entry at the date of settlement that payment must be made within a year. This provision was incorporated into the pre-emption laws of Sept. 4th, 1841, and although section ten of that act provided that no sections of land reserved to the United States, alternate to any other sections granted to any of the States for the construction of any
192 canal, railroad or other public improvement should be liable to entry under the provisions of that act; yet afterwards when this restriction was removed, and the lands within the grant thrown open for settlement under the pre-emption laws, but were not subject to private entry, they are to be treated in the same manner as unoffered lands, and a party pre-empting any portion of the same has thirty months after date of filing his declaratory statement in which to make final proof and pay for the land. In Towsley v. Johnson, 1 Neb. 95, this court say: The object of the guards thrown around the privilege of pre-emption by the law is to secure on the public lands actual permanent settlers. The plaintiff in this case is shown to be an actual permanent settler who went upon the land in question for the purpose of cultivating the same and making his home thereon. Can the same be said of the defendant? Has there ever been an actual bona fide attempt even by him to make an actual settlement on the lands in question? If so, the record fails to disclose it. The claim of danger in a peaceable, law-abiding community evidently afforded a convenient pretext for not residing on the land, but is not entitled to much consideration. The equities of the case are clearly with the plaintiff. The jurisdiction of a court of equity is undoubted to determine the rights of the parties (Johnson v. Towsley, 13 Wall., 73, 1 Neb., 95), and under the code an equitable defense may be set up in action of ejectment. The judgement of the district court is
193 reversed, and judgment is entered in favor of plaintiff, the plaintiff to pay to the clerk of this court for the defendant within ninety days the amount paid by him for entering said land with interest to the date of payment, and thereupon the defendant shall convey the legal title to the plaintiff.

Judgment accordingly.

STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court, do hereby certify that the above is a true, correct, and complete copy of the petition in error, transcript, proceedings of the supreme court and opinion of said court, delivered by Hon. Samuel Maxwell in the cause therein entitled as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 5th day of March, A. D. 1878.

[SEAL.] GUY A. BROWN, *Clerk.*

194 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Samuel Stalnaker, plaintiff in error, and John Morrison, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their
195 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John Morrison as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER,
Jud'e Sup. Court U. S.

STATE OF NEBRASKA:

In accordance with the command of the within writ I hereby return a full and complete transcript of the judgment and proceedings in said cause as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of December, 1878.

[SEAL.] GUY A. BROWN,
Clerk Supreme Court.

196 Know all men by these presents that we, John Morrison, principal, and C. C. Burr, and T. H. McGahey, sureties, all of the city of Lincoln, Lancaster County, Nebraska, are held and firmly bound unto Samuel Stalnaker, in the full and just sum of two hundred (200) dollars to be paid to the said Samuel Stalnaker, and his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 31st day of October, in the year of our Lord one thousand eight hundred and seventy-eight (1878).

Whereas lately at a trial of a cause in the supreme court of the State of Nebraska, in a suit depending in said court, between Samuel Stalnaker versus John Morrison, in error, judgement was rendered against the said John Morrison, and the said John Morrison having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaids uit, and a citation directed to the said Samuel Stalnaker, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said John Morrison shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—
G. M. LAMBERTSON.
WM. L. PEABODY.

JOHN MORRISON. [L. S.]
CARLOS C. BURR. [L. S.]
T. H. McGAHEY. [L. S.]

Approved by—

SAM. J. MILLER,
Judge Sup. Court U. S.

DEC'R 1, 1878.

197 UNITED STATES OF AMERICA,
District of Nebraska, ss:

Carlos C. Burr, being first duly sworn on oath, says he is one of the sureties in the foregoing bond, and that he is worth the sum of five hundred dollars over and above all debts and incumbrances and liabilities in unincumbered property not exempt by law from the payment of debts.

CARLOS C. BURR.

Subscribed in my presence & sworn to before me this 2nd day of November, 1878.

[SEAL.] LORENZO W. BILLINGSLEY,
U. S. Commissioner.

DISTRICT OF NEBRASKA, *ss:*

T. H. McGahey, being first duly sworn on oath, says he is worth the sum of five hundred dollars over and above all his debts and liabilities

in unincumbered property not exempt by law from execution for the payment of debts.

T. H. McGAHEY.

Subscribed in my presence & sworn to before me this 2nd day of Nov., 1878.

[SEAL.] LORENZO W. BILLINGSLEY,
U. S. Commissioner.

198 The United States of America to Samuel Stalnaker greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Nebraska, wherein John Morrison is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, this thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

SAM. F. MILLER.

199 On this seventh day of December, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared J. Miller Knox before me, the subscriber, G. M. Lambertson, a notary public, duly commissioned for and residing in said Lancaster County, and makes oath that he delivered a true copy of the within citation to T. M. Marquette, the attorney of record in said cause within described of Samuel Stalnaker.

J. MILLER KNOX.

Sworn to and subscribed the seventh day of December, A. D. 1878.

G. M. LAMBERTSON,
Notary Public, Lancaster County, Nebraska.

(Indorsement on cover:) No. 149. John Morrison vs. Samuel Stalnaker, plaintiff in error. Nebraska sup. court. Filed 31st December, 1878.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

No. 149.

JOHN MORRISON, PLAINTIFF-IN-ERROR,

vs.

SAMUEL STALNAKER.

BRIEF FOR JOHN MORRISON.

STATEMENT OF THE CASE.

This was originally an action commenced by John Morrison against Samuel Stalnaker, in the District Court of Cass county, Nebraska, to recover possession of the north half of the northwest quarter of Section 18, Township 11 North, Range 9 East, in said county and State; and damages for the detention of the same by Stalnaker.

In his petition, (Record, page 51,) Morrison alleged seizure of said land in fee, with the right of possession in himself; actual possession, an unlawful detention of the same; and an appropriation of the rents, issues and profits by Stalnaker, to his (Morrison's) damage in the sum of one thousand dollars.

Stalnaker in answer, (pages 60–64,) denied Morrison's right of possession; and further alleged, in substance and effect, that he (Stalnaker) had, on the 18th day of January, 1871, settled upon said land, as a pre-emptor, having purchased the claim and improvements of a prior settler upon the same; that he (Stalnaker) had, on the 16th day of February, 1871, made a declaratory statement for said land; that he had thereafter resided upon, cultivated and improved the same, complying with the requirements of the pre-emption law; that he had, on or about the 14th day of May, 1872, appeared before the register and receiver of the land office, at Lincoln, Nebraska, and offered to make, and

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY, Clerk.

IN THE

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did make, full proof of his said settlement and residence upon said land, and of the improvement and cultivation of the same; and also, that he was a citizen of the United States, over the age of twenty-one years and the head of a family; that his family had resided with him on the land; that he had never enjoyed the benefit of the pre-emption law; that he was not the owner of three hundred and twenty acres of land; that he had not removed from land of his own to make his said settlement; and that he was in all respects qualified and entitled to enter said land, under the pre-emption laws; that he then and there made the necessary pre-emption affidavit, and an offer in writing to purchase said land; and also tendered to the receiver the full price therefor; that the register and receiver rejected his said proofs; that the receiver refused to receive the money tendered for said land; that he (Stalnaker) did then and there appeal from their decision rejecting his proofs, &c.; that he made his appeal in writing and filed the same with the register and receiver, to be transmitted to the Commissioner of the General Land Office; that the papers in the case were suppressed or destroyed; that the fact of their suppression was not known to him, until Morrison had obtained a patent for said land; and that he supposed that the said appeal and papers had been sent to the General Land Office.

Stalnaker further answering alleged, in substance and effect, that on the 14th day of May, 1872, Morrison made a homestead entry, covering said land; but that he never resided upon or improved the same, and never attempted, or intended, to make any permanent or *bona fide* settlement thereon.

Stalnaker further alleged, in substance and effect, that, on the 26th day of February, 1873, the said Morrison, without notice to him (Stalnaker) and without his knowledge, appeared before the register and receiver, and by means of affidavits and proofs to the effect that he (Morrison) had settled or attempted to settle upon said land, and had intended to reside upon, improve and cultivate the same, and fully comply with the requirements of the homestead law, and was prevented from so doing by the force, violence and threats of an armed mob, and the fear of further violence at their hands, procured the allowance of a commutation of his said homestead entry to a cash entry and thereby became the purchaser of said land, and that afterwards, on the 13th day of May, 1873, the said Morrison, by undue means, obtained a patent for the same.

Stalnaker further alleged, in substance and effect, that said proofs and affidavits were false and fraudulent, and that said Morrison never attempted nor intended to settle permanently on said land, nor to reside upon, improve and cultivate the same, nor to comply with the requirements of the homestead law.

Stalnaker further alleged, in substance and effect, that the commutation of the homestead entry, so procured, was in violation of law, and that Morrison's said cash entry was null and void.

Morrison, in reply, (Record, pages 66–68,) denied, specifically, the several allegations in said answer relative to Stalnaker's alleged settlement and claim and the alleged proceedings before the land office to perfect and make entry of the land. Morrison also denied, specifically, Stalnaker's allegations relative to the taking of an appeal from the decision of the register and receiver and the suppression of the same and the papers in the case.

Morrison further specifically denied every allegation in said answer to the effect that his own proofs and affidavits were false and fraudulent, and that the commutation of his homestead entry was in violation of law, and that his said cash entry was null and void. He also denied that he obtained his patent by undue means; and averred the truth to be that his affidavits and proofs were true and that he had intended to settle and reside upon said land, and to improve and cultivate the same and comply fully with the requirements of the homestead law; and that he had made every effort, and used all legal means to do so, but had been prevented by the threats and violence of the said Stalnaker, and a mob of his friends and relatives, who ejected and forcibly removed him (Morrison), his family, assistants, &c. &c., from said land.

Morrison, further replying to said answer, averred that, on the 14th day of May, 1872, he made a homestead entry, embracing said land, and that having complied with the law, except in so far as he had been prevented by the threats and violence of said Stalnaker, the Government had, on the 13th day of May, 1873, issued a patent conveying to him (Morrison) the said tract of land.

At the trial in the District Court, Morrison showed, (Exhibit B, Record, page 3,) that before the commencement of his action he had duly notified Stalnaker to quit said tract of land. Morrison also showed, (Exhibit A, Record, page 31,) that the Government had conveyed to him the fee simple title to said land, by patent duly executed and issued. He also showed by the testimony of witnesses, (Record, pp. 4–8,) that the yearly rental value of said land was from $2.50 to $3.00 per acre, and that the tract contained 68 acres.

Stalnaker then testified, in substance and effect, in behalf of himself, (Record, pages 8, 9, 10, 13, 14, 15, 17, 40 and 41,) that he had resided upon the land in controversy for about six years, having removed to the same about the first week in October, 1870; that there was, at that time, a house 16x18 on the land, and 25 or 30 acres broken; that he bought the place of a home

stead settler named Brownly for $800; that he, Stalnaker, had further improved the land by building an addition to the house, breaking and cultivating land, planting forest trees, &c.; that he had filed a declaratory statement, as a pre-emptor, on the 16th day of February, 1871; that he was the head of a family; that he was not the owner of any other land; and that he had not contracted to sell or convey the land in controversy.

Stalnaker further testified, in substance and effect, that he appeared before the register and receiver with his witnesses, about the last of May or first of June, 1872, to make final proof, and payment for said land; and that he then and there testified about that little house on the land, and that he had dug a well, a cellar, and planted about 4,000 forest trees; also, that he had cultivated about 50 or 55 acres of the land; that he was the head of a family; that he did not own other land, and that he had not made a contract to convey the land in controversy; also, that his witnesses then and there testified that he (Stalnaker) had a little frame house 14x16, with basement, a stable, a well, about 50 or 55 acres broken, 25 or 30 acres of which were broken when he went there in October, 1870; and also, that he had 4,000 forest trees planted.

Stalnaker further testified, in substance and effect, that at the time said testimony was submitted, he made, through his attorney, Mr. Chapin, a tender of a check for $200 in payment for said land to Mr. Summerlad, who refused to receive the same, saying that there was a homestead on the land.

W. F. Chapin, witness for Stalnaker, testified (Record, pp. 10, 11, 12, 13, 22 and 48) that he acted as attorney for Stalnaker, at the time he attempted to make final proof, &c.; that Mr. Summerlad was then the register of the land office; that he (Chapin) tendered to said register a check in payment for said land, and that he refused to receive the same on the sole ground that Stalnaker had not made his final proof within twelve months, and that Morrison's adverse claim had attached to the land. Chapin further testified that the decision of the Register and Receiver, in said matter, was adverse to Stalnaker; that an appeal was taken from said decision; that afterwards an examination was made, in the local land office, for the papers in the case, but that they could not be found; that he (Chapin) wrote the Commissioner of the General Land Office, asking whether said papers had reached that office, and received an answer that they had not and were not on file there; that this was in the winter of 1872–3, before Morrison had made final proof, but after, a letter allowing him to do so had been found on file in the local land office.

The testimony of Stalnaker, so far as it related to the fact of his settlement and residence upon the land, and the improvement

and cultivation of the same, was corroborated by the testimony of James McMurray, (Record, page 15,) and by that of John McMurray, (Record, page 16,) but, in so far as it relates to his (Stalnaker's) alleged attempt to make final proof and payment, and what was then and there done, it is without support or corroboration other than that furnished by the testimony of Chapin, hereinbefore referred to. The testimony of Job McMurray (Record, page 17) relates to affidavits made several months after the alleged attempt of Stalnaker to make final proof and payment.

Stalnaker and his witnesses, Job and John McMurray, testified, in substance and effect, (Record, pages 17, 18, 19, 20, 21, 41, 42, 46 and 47,) that they were present at or about the time that Morrison went upon the said land; that he had two teams and two loads or parts of loads; that he had some women with him; that they looked and talked as though they came there with the intention of stopping; that they had a carpenter with them; that they had lumber in the wagons; that Morrison said he came there with the intention of building a house, and that he would build a house there; that Stalnaker told Morrison that he would not let him build a house there, and that if he attempted to do so he (Stalnaker) would push down the pieces as fast as Morrison could set them up; that Stalnaker further declared that no man could live in peace there, and that finally Stalnaker, assisted by about a half a dozen persons, removed Morrison's wagons, lumber, &c., from the land.

Morrison in rebuttal testified (Record, pp. 25–33) that he made a homestead entry, covering said land, May 14, 1872, without any knowledge that it had been settled upon or improved by any one; and that he had no such knowledge until about three weeks later, when he went upon the land to select a site for a house and to have some breaking done; that he then found Stalnaker on the land, and upon ascertaining that he claimed the same offered to leave it if he (Stalnaker) would repay him what he had expended in securing his homestead, but that Stalnaker threatened his life, &c.; that he (Morrison) afterwards in the summer of 1872, procured lumber and had the materials for a house constructed and ready to put up; that he then removed to the land with his family, at the same time taking the lumber and a carpenter to put up the house; that soon after they reached the land Stalnaker ordered them to leave as quickly as possible; that upon their declining to leave Stalnaker, assisted by a number of other parties, removed his (Morrison's) wagons, lumber, &c., from said land to the road, and also removed him, his family and assistants from said land; that after they had been removed to the road a crowd of persons followed them with threats for about two miles. Morrison further testified that he went to the land to live there and comply with the law; that he was

prepared to do so; and that the only reason he did not stay there and do so was, that he was driven and dragged off. This testimony of Morrison, relative to his removal to the land with his family, and his and their forcible expulsion from the same by Stalnaker and a mob of his friends, is fully corroborated and sustained by the testimony of Hiram Boone, (Record, pages 33–37;) by the testimony of E. W. Rhykerk, (Record, pages 37–39,) by the testimony of Mrs. Rhykerk, (Record, pages 42–45,) and by the testimony of Mrs. Boone, (Record, pages 45–46.) It is also substantially corroborated and sustained by the testimony of Stalnaker and his witnesses, Job and John McMurray, hereinbefore referred to.

It is shown by the testimony of J. B. McDonnell, register of the land office, (Record, page 21,) and by that of Stalnaker himself, (Record, page 9,) that the lands in controversy had been offered, and that Stalnaker's filing was for offered lands. The District Court found the issues in favor of Morrison, and rendered judgment awarding the land and the possession thereof to him, together with damages, for the detention of the same, assessed at three hundred and fifty dollars. Stalnaker thereupon appealed, from said judgment, to the Supreme Court of the State of Nebraska. The Supreme Court found the issues in favor of Stalnaker, reversed the judgment of the District Court, and rendered judgment awarding the land to Stalnaker, holding in substance and effect, (Record, pages 73 and 74,) that he had settled upon said land, as a pre-emptor, January 18, 1871; that at that time the said land belonged to the United States; that on the 16th day of February, 1871, Stalnaker filed with the register of the proper land office a declaratory statement of his intention to pre-empt said land; that the same was within the limits of the grant of lands from the United States to the Burlington and Missouri River Railroad Company; that it had been offered at public sale prior to the passage of the Act making said grant, but was not, at the date of Stalnaker's settlement and filing, subject to private entry; that Stalnaker had resided upon and cultivated said land, from the time of his settlement, and had made valuable improvements thereon; that, on or about the first day of June, 1872, he had appeared at the proper land office with his witnesses and offered to prove all the facts necessary to entitle him to enter said land; and had then and there offered to pay the sum of money required therefor; that the register and receiver refused to permit him to do so, holding that by reason of his failure to make proof within one year from the date of his settlement he had forfeited his right to said land; that Morrison then held the legal title to said land; that the same having been embraced within the limits of said railroad grant subsequent to the offering of the same at public sale was not, at the date of Stalnaker's

settlement and filing, subject to private entry; that according to the Act of Congress of March 6, 1868, it was only subject to entry under the pre-emption and homestead laws; that under the provisions of Sections 2264, 2265, 2266 and 2267, Revised Statutes of the United States, it was only in cases where lands were subject to private entry, at the date of settlement, that a pre-emptor was required to make final proof and payment, within a year from the date of his settlement; and that when lands had been offered at public sale, and thereby made subject to private entry, and were afterwards included within the limits of a grant to a railroad company, and thereby withdrawn from private entry, and became subject to settlement and entry under the pre-emption laws, they were to be treated as unoffered lands; and that a party, pre-empting such lands, had thirty months from the date of filing his declaratory statement, within which to make final proof and payment.

Morrison thereupon obtained a writ of error and had the case removed to the Supreme Court of the United States, where the same is now pending.

Assignment of Errors.

The Supreme Court of the State of Nebraska erred:

First. In concluding, finding and holding that Stalnaker, on or about the first day of June, 1872, offered, as aforesaid, to prove all the facts necessary to entitle him to enter said land.

Second. In concluding, finding and holding that said Stalnaker then and there offered to pay for said land the sum of money required.

Third. In concluding, finding and holding that it was only in cases where lands were subject to private entry, at the date of settlement, that a pre-emptor was required to make final proof and payment within a year from the date of his settlement.

Fourth. In concluding, finding and holding that when lands had been offered at public sale, and thereby made subject to private entry, and were afterwards included within the limits of a grant to a railroad company, and thereby withdrawn from private entry, and made subject to settlement and entry, under the pre-emption laws, they were to be treated as unoffered lands, and that a party, pre-empting such lands, had thirty months from the date of filing his declaratory statement within which to make final proof and payment.

Fifth. In concluding, finding and holding the issues in favor of Stalnaker; and in reversing the judgment of the District Court, and rendering judgment in favor of Stalnaker.

Argument.

The inference or legal conclusion drawn from the testimony, by the Supreme Court of the State of Nebraska, to the effect that Stalnaker had, on or about the first of June, 1872, offered, at the proper land office, to prove all the facts necessary to entitle him to enter the land in controversy, is not sustained by the facts proven. Under the provisions of the pre-emption act of September 4, 1841, Sections 10, 12 and 13, Statutes at Large, Volume 5, pages 455 and 456, and the Regulations of the land office issued pursuant to and in conformity therewith, (Lester's Land Laws, Volume 1, page 360, No. 408, and from C appended thereto,) it was necessary for Stalnaker, as a condition precedent to entry, to prove by his own oath and that of witnesses the following facts:

First. That he was the head of a family, or a single man over the age of twenty-one years.

Second. That he was a citizen of the United States, or that he had filed his declaration of intention to become such.

Third. That he had made settlement, in person, on the land; and the date of such settlement.

Fourth. That he had inhabited and improved the same, and that he had a dwelling house thereon, &c.

Fifth. That he was not the owner of three hundred and twenty acres of land in any State or Territory.

Sixth. That he had not quit or abandoned his residence on his own land to reside on the land in controversy.

Seventh. That he had never had the benefit of any right of pre-emption, &c.

Eighth. That he had not settled upon and improved the land in controversy, to sell the same on speculation, but in good faith to appropriate it to his own exclusive use.

Ninth. That he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself.

According to the testimony no offer or attempt was made by Stalnaker to prove all of these facts. The only testimony relating to this matter is that of Stalnaker himself, (Record, pages 9, 10, 11, 12 and 17,) who states that he appeared at the land office about the last of May or first of June, 1872, with two witnesses, Powell and Matthews; that his witnesses testified that he had a little frame house 14x16, a well, a stable, a basement, about 50 or 55 acres broken, 4,000 forest trees planted, and that he (Stalnaker) moved to the land in October, 1870; and that he himself testified, at that time, about that little building on the farm; that he dug a well, a cellar, planted about 4,000 forest trees,

cultivated about 50 or 55 acres of land, and that he was the head of a family; that he did not own any other land, and that he had not made any contract to convey the land in question. This is all. The proof, therefore, which Stalnaker says that he made at the land office, and which is the only proof that he pretends to have offered there at the time of his alleged attempt to enter said land, did not contain a single word tending to show that he was a citizen of the United States, or that he had declared his intention to become such, or that he had not previously had the benefit of the pre-emption right, or that he had not settled upon and improved the land in question, to sell the same on speculation, &c. Nor did the proof alleged to have been made sufficiently show that he had resided upon or inhabited said land as required by law, or that he had not quit or abandoned a residence on lands of his own to reside on said land, or that he had not made any agreement, &c., whereby the title which he might acquire, &c., should inure in whole or in part to some person other than himself. The vague and general statements that Stalnaker moved to the land in question in October, 1870; that he did not own any other land, and that he had not made any contract to convey the land in question, did not prove that he had resided upon or inhabited said land, after the date of his settlement, or that he was not the owner of three hundred and twenty acres of land at that time, or that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. Nor do such statements fulfill the requirements of sections 10, 12 and 13 of the pre-emption act of September 4, 1841, or of the Regulations issued pursuant thereto. The conclusion of law, deduced by the Court from the testimony, that Stalnaker had offered to prove all the facts necessary to entitle him to enter said land was and is erroneous, and must be so held. It is true that Stalnaker testified in Court (Record, page 8) that he had resided upon the land in question for about six years; and (page 9) that he had no land, at the time he moved there; and (page 40) that he had never, at any time, exercised the right of pre-emption; but he did not testify that he had made or attempted to make any proof of these facts at the land office. His testimony to these facts before the Court cannot be permitted to supply the omission of proof of them before the land office. But had Stalnaker proven these facts before the land office, in addition to what he states that he did prove there, it would not have entitled him to enter said land in the utter absence of proof of citizenship, and that he did not settle upon and improve said land to sell the same on speculation, and in the presence of the insufficient proofs on other material points, above referred to.

Nor is the conclusion of law, drawn by said Court from the testimony, to the effect that Stalnaker made a legal tender of payment for said land, sustained by the facts proven. Waving all other defects in the proof of the alleged tender, it is sufficient to say that it does not show that it was made to an officer authorized and empowered to receive it. On the contrary, it does show that it was made to an officer who was not so authorized or empowered. The only testimony on this point is that of Stalnaker and his attorney, Chapin. Chapin, (Record, page 48,) testifies to having made the tender, but does not clearly state to whom he made it. The natural inference from his testimony, however, is that he made it to the register of the land office, and that *he*, the register, refused to receive it. Stalnaker is more specific, and swears positively that the tender was made in his presence by Chapin, and that it was made to Mr. Summerlad, (Record, page 40,) and that he refused to receive it, (page 41.) It is evident that they both refer to the same transaction and that only one tender was made, that by a check offered by Chapin. Chapin testifies, (page 23,) that, at the time Stalnaker attempted to make final proof and payment, Mr. Summerlad was the register of the land office. The law required the tender to be made to the receiver. (Section 6, Act of Congress of May 10, 1800, Statutes, Volume 2, page 75; Section 2, Act of April 24, 1820, Statutes, Volume 3, page 566; Lester's Land Laws, Volume 1, Title 1, page 311.) The conclusion of the Court, drawn from this evidence, that Stalnaker had made a legal and sufficient offer to pay for the land, is clearly erroneous.

The Court further erred in concluding, finding and holding that it was only in cases where lands were subject to private entry, at the date of settlement, that a pre-emptor was required to make final proof and payment within a year from the date of his settlement; and that, when lands had been offered at public sale, and thereby made subject to private entry, but afterwards included within the limits of a railroad grant and thereby withdrawn from private entry, and made subject to settlement and entry under the pre-emption laws, they were to be treated as unoffered lands, and that a party pre-empting such lands had thirty months from the date of filing his declaratory statement, within which to make final proof and payment. The law relating to the time of making final proof and payment, so far as it affects the present controversy, is found in Section 15, Act of September 4, 1841, (Statutes, Volume 5, page 457,) re-enacted as Section 2264, Revised Statutes; Section 5, Act of March 3, 1843, (Ib., page 620,) re-enacted as Section 2265, Revised Statutes; Section 7, Act of May 30, 1862, (Statutes, Volume 12, page 410,) re-enacted as Section 2266, Revised Statutes; and Section 2, Act of July 14, 1870, (Statutes, Volume 16, page 279,) re-enacted as Section 2267, Revised Statutes. Section 2264 provides that when a

person settles on a tract of land, *subject to private entry*, intending to purchase the same, he shall file a declaratory statement within thirty days, and make proof and payment within twelve months after the date of his settlement. Section 2265 provides that a claimant for land, *not yet proclaimed for sale*, shall file a declaratory statement within three months after the date of his settlement. Section 2266 provides that a settler on *un*surveyed land shall file a declaratory statement within three months after the date of the reception of the approved plat of the township, embracing his settlement, at the district land office; and section 2267 provides that all pre-emption claimants under Sections 2265 and 2266, shall, when no shorter time is prescribed by law, make proof and payment within thirty months after the date prescribed therein, respectively, for filing declaratory statements, has expired. As the land in question was *surveyed*, at the date of Stalnaker's settlement, it is very clear that his claim was not within the purview of Section 2266, and as the same had been "offered" or proclaimed for sale, (Record, pages 9 and 21,) it is equally clear that it was not within the purview of Section 2265; for these sections relate exclusively to the claims of settlers on *un*surveyed land, and land *not yet proclaimed for sale*. If he had any right as a pre-emptor it was to land that had been offered, or proclaimed for sale, and he so made his filing. (Register's Certificate, Record, page 9.) He was, therefore, required to make final proof and payment within one year after the date of his settlement, the same as though the land had been actually subject to private entry. The law granting thirty months to pre-emptors did not relate to or embrace land that had been once "offered" or proclaimed for sale any more than it did land actually subject to private entry. The conclusion of the Supreme Court, in this connection, is not only contrary to law, but it is in direct conflict with the rulings and practice of the Interior Department for forty years. Lester's Land Laws, Volume 1, page 359, paragraph 4; Copp's Land Laws, page 306, No. 363; Copp's Land Owner for July, 1881, page 58, title Southern Public Lands. In this latter case, the ruling of the Department is directly in point. It relates to lands precisely in the condition that the tract in controversy was in at the time Stalnaker filed upon it, and says that:

"By the long established rules of the Department, lands in "such condition have been with respect to the time required for "filing, proof and payment classed as 'offered,' and subject to "the same regulations as lands actually subject to private entry. "It is true that such lands do not fall strictly within the lan-"guage of either Section 2264 or 2265 of the Revised Statutes, "and may, therefore, be said to constitute in reality a third class, "to which neither provision will technically apply. In such "case, only two classes being described by law, it became a prac-

"tical question, at an early period, to determine by the reason "and analogy of the law to which this anomalous class most "nearly assimilated, and what rule would work the least confu- "sion in administration. That question was settled in favor of "the rule as stated, and it has not since been departed from. * "* * * Hundreds, perhaps thousands, of cases have been "adjudicated under this rule, and I do not know of an exception "made against its application."

The decision further proceeds to show that the application of the rule has secured uniformity, as respects the rights of settlers in localities where lands have been offered, and made subject to filing within thirty days and proof and payment within twelve months from the date of pre emption settlements, but where by fortuitous circumstances some of the tracts are afterwards withdrawn from private entry; and that but for the application of the rule inequality and injustice would have resulted.

The construction placed upon the law by the Land Department was both reasonable and necessary, and having been adhered to for forty years it should not be disturbed. Whenever an act of Congress has by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succe sion of years, it must be a strong and palpable case of error and injustice to justify a change in the interpretation to be given it. (2 Op. Atty. Gen., page 558; 10 Ib., page 52.) A contemporaneous understanding of a statute, corroborated by an undeviating usage of thirty years, must govern in its judicial construction. Dwar. on Stat., 693; 1 Cranch, 299; 5 Cranch, 22, and 18 Howard, 45.

But in this case we need not rely upon Departmental construction alone. Congress has by act, approved July 7, 1870, sanctioned and endorsed that construction. (Statutes, Volume 16, page 188.) That act was for the relief of certain settlers in Nebraska, including those within the limits of the grant to the Burlington and Missouri River Railroad Company, who had filed their declaratory statements prior to the first day of January, 1870, for lands once offered at public sale and afterwards included within the lateral limits of any withdrawal for railroad grants, where such lands were at date of filing, as aforesaid, subject to disposal, under the pre-emption laws, and *who, through erroneous belief that by such withdrawal the lands so settled upon and claimed had become subject to the designation of "unoffered" lands, had failed to make the proof and payment required by law within one year from the date of alleged settlement;* and provided that such settlers should have one year from the date of the act within which to make proof and payment.

Here we have a plain declaration by Congress, itself, that settlers upon lands precisely in the same condition as the tract in controversy, had erred in regarding and treating them as "unof-

fered" lands, and in failing to make proof and payment within one year from the date of settlement; and the act implies that they had forfeited their rights by such failure and that they could only be saved by the passage of a bill for their relief. Stalnaker having made his settlement and filing after the first day of January, 1870, does not come within the purview of the Act, and must be treated as having forfeited his pre-emption right by a failure to make proof and payment or to tender the same, within twelve months after the date of his settlement. After the expiration of twelve months from the date of his settlement, Stalnaker was without right to question or control the entry of Morrison in the Land Department; and after patent issued, he, (Stalnaker,) was without right to contest Morrison's title in the Courts. Stalnaker's occupation of the land, after the expiration of twelve months from the date of his settlement, ceased to be a rightful and legal occupation, and, after Morrison's entry, became that of a tresspasser, not only against the Government, while it retained the fee simple title, but against Morrison. The mere naked occupation of the land by Stalnaker without right, and more especially as the same does not appear to have been enclosed, or reduced as a whole to actual possession, was no bar to the acquisition of title by Morrison. Atherton vs. Fowler, 96 United States, (6 Otto,) page 516. The Government cannot be forever deprived of the right to dispose of its lands by the naked occupation of a settler. The patent issued to Morrison is conclusive as against the Government and as against Stalnaker, he having failed to establish a right of pre-emption in himself, at the date of Morrison's entry. (Bagnell vs. Broderick, 13 Peters, 436; United States vs. Stone, 2 Wallace, 525.) The charge made against Morrison that he obtained a commutation of his original homestead entry by false and fraudulent proofs and his patent by undue means, is not sustained by the evidence, but on the contrary it fully appears by the testimony submitted by Stalnaker as well as that submitted by Morrison, that the alleged proofs were true. It was not for Morrison to establish the regularity and legality of his entry and patent, but for Stalnaker to establish their irregularity and illegality, and a prior right to the land in himself. He utterly failed to do either. It is clear, therefore, that the Supreme Court of Nebraska erred in finding the issues in favor of Stalnaker, and in reversing the judgment of the District Court and awarding the land in controversy to Stalnaker. The authorities upon which we rely do not appear to have been called to the attention of said Court or considered by it.

Respectfully,

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NOTE.—The references to the Record mean printed record.